In the Supreme Court of the United States

OCTOBER TERM, 1970

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Outperformed Proceeding)

MOTION FOR EXPEDITED CONSIDERATION AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
MARVIN KONIGSBERG,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

GEORGE T. WOOCH,
General Counsel,
ROBERT L. PIERCE,
Attorney,
WILLIAM M. BAIRD,
Attorney,
Federal Power Commission,
Washington, D.C. 20426.

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MOTION FOR EXPEDITED CONSIDERATION

The Solicitor General, on behalf of Federal Power Commission, respectfully moves the Court to expedite consideration of the petitions for writs of certiorari as follows:

(a) By requiring any response to the attached petitions for writs of certiorari to be filed by February 28, 1972; and

(b) By establishing a briefing schedule, if the Court grants one or both of the petitions, that will permit the case or cases to be heard at the April argument session. In the event certiorari is granted at the end of the February argument session, we will file our brief on the merits by March 17 and suggest that respondents' briefs on the merits should be filed by April 12.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Federal Power Commission* v. *Louisiana Power & Light Company, et al.* (the "collateral proceeding") and for a writ of certiorari before judgment to review the opinion and

order of the Commission in *Federal Power Commission* v. *Louisiana Power & Light Company, et al.* (the "curtailment proceeding") now pending on petitions for review in the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra,* pp. 1a–27a) and the district court (App. C, *infra,* pp. 30a–42a) in the collateral proceeding are not yet reported. An earlier order of the court of appeals in the collateral proceeding (App. D, *infra,* pp. 43a–47a) is not reported. The opinion of the Federal Power Commission in the curtailment proceeding (App. E, *infra,* pp. 48a–76a) and the opinion of the Commission denying rehearing (App. F, *infra,* pp. 77a–84a) are not yet reported.

JURISDICTION

The judgment of the court of appeals in the collateral proceeding (App. B, *infra,* pp. 28a–29a) was entered on January 14, 1972. The order of the Commission denying rehearing in the curtailment proceeding (App. F, *infra,* pp. 77a–84a) was issued on December 3, 1971, and six petitions for review were timely filed in the court of appeals. The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717, *et seq.,* to accept, approve, or modify a plan for the curtailing of natural gas deliveries by interstate

pipelines to direct corporate users in order to effect a fair allocation of natural gas supplies among all utimate gas consumers, incuding domestic users, in times of gas shortage.

2. Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities.

STATUTES INVOLVED

Sections 1, 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. 717, 717c, 717d, 717f and 717o, are set forth in Appendix G, *infra*, pp. 85a–92a.

STATEMENT

These cases involve the jurisdiction of the Federal Power Commission over allocation of the gas supply of an interstate natural gas pipeline company when the company's gas supply is insufficient to meet its total contractual commitments. In a proceeding initiated by the United Gas Pipe Line Company ("United"), the Commission determined that it had jurisdiction over the curtailment of deliveries of natural gas in interstate commerce to direct industrial customers as well as over the curtailment of deliveries to customers for resale to others (App. E, *infra*, pp. 48a–76a). Review of the Commission's determination (the curtailment proceeding) is presently pending before the court of appeals.

While the curtailment proceeding was pending before the Commission, Louisiana Power and Light Company ("LP&L") brought an action in the United States District Court for the Western District of Louisiana (the collateral proceeding) to enjoin United from curtailing natural gas deliveries to two of LP&L's generating plants. The district court dismissed the suit on the ground that curtailment proceedings were within the Commission's jurisdiction and that LP&L was required to exhaust its administrative remedies prior to seeking judicial relief. The court of appeals reversed, holding that the Commission has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct sales industrial customers (App. A, *infra,* pp. 12a–22a). Prior to the court of appeals' decision, the Commission's opinion reaching the contrary conclusion in the curtailment proceeding was handed down (App. E, *infra,* pp. 53a–66a).

The court of appeals also held in the collateral proceeding that the Commission had no jurisdiction to issue a certificate of public convenience and necessity authorizing United to continue operating certain of its pipeline facilities used to deliver natural gas to one of LP&L's generating plants (App. A, *infra,* pp. 22a–26a), despite the pendency of a proceeding initiated by United before the Commission involving the same issue.

A. PROCEEDINGS BEFORE THE COMMISSION

THE CURTAILMENT PROCEEDING

In October 1970, United, a natural gas company subject to the Commission's jurisdiction, filed a petition with the Commission for an order declaring that its implementation of a curtailment plan was consistent with the terms of its tariff on file with the Commission and its direct sales contracts (App. E, *infra*, pp. 48a–49a). The petition alleged that United did not have sufficient gas reserves to meet its total contractual commitments (*ibid.*). Following notice and interventions by numerous parties, including LP&L, the matter was set for hearing before an examiner. Extensive hearings followed in which all parties and intervenors were given an opportunity to present evidence and file briefs.[1] Since a number of parties, including respondent LP&L, were claiming that the Commission had no jurisdiction over the curtailment of service to direct industrial customers, as distinguished from resale customers (*i.e.*, distributors and other

[1] Subsequent to the presentation by United of its direct testimony, all parties and intervenors, except the Monsanto Company, agreed, as an interim settlement, to a winter curtailment program from November 1, 1970, until March 31, 1971. Monsanto's appeal from the Commission's order approving the interim settlement is now pending before the United States Court of Appeals for the District of Columbia, *sub nom. Monsanto Co. v. Federal Power Commission*, No. 71-1306 (C.A. D.C.). On February 22, 1971, United filed a supplement to its original petition to provide a summer curtailment plan from April 1971 through October 1971. On May 17, 1971, United sought approval of another curtailment program, filed pursuant to Order No. 431 (36 Fed. Reg. 7505), which became effective on November 1, 1971. Questions relating to the effective date of this plan are under review in *Mobile Gas Service Corp., et al.* v. *Federal Power Commission*, 71-1607 (C.A. D.C.).

pipelines), the intermediate decision of the examiner was waived and the matter was presented to the Commission for decision (*id*, at 52a).

On October 5, 1971, the Commission issued Opinion and Order No. 606 (App. E, *infra*, pp. 48a–76a) holding, *inter alia*, that it had plenary jurisdiction under the Natural Gas Act to accept, approve or modify the curtailment plans proposed by United or any other jurisdictional pipeline company relating to gas transported to either direct or resale customers.[2] This jurisdiction, the Commission ruled, flowed primarily from the Act's application, under Section 1(b), to the "transportation of natural gas in interstate commerce" and the Commission's authority under Sections 4(b) and 5(a) of the Act to prohibit discriminatory practices (*id.* at 55a, 61a). In rejecting the contention that it could not allocate natural gas in a manner inconsistent with a pipeline's direct sales contracts, the Commission noted that (*id.* at 53a–54a):

> * * * if the gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers—made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all States served by the jurisdictional pipelines.

Petitions for review of the Commission's decision, filed pursuant to Section 19(a) of the Natural Gas Act

[2] Certain issues relating to the propriety of United's particular curtailment plan were remanded to the hearing examiner for further consideration (*id.* at 75a).

(15 U.S.C. 717r(a)), are now pending before the United States Court of Appeals for the Fifth Circuit.

THE CERTIFICATE PROCEEDING

Also in October 1970, United filed an application with the Commission for a certificate of public convenience and necessity authorizing it to continue operating a portion of its pipeline facilities which is located wholly within Louisiana and is used to supply LP&L's Nine-Mile Point generating station (App. E, *infra*, p. 53a). United alleged that these facilities were previously part of an intrastate system but had become subject to federal jurisdiction by virtue of the injection into the system of a quantity of gas in interstate commerce. Numerous parties, including LP&L, intervened and hearings were held. Intermediate decision by the examiner having been waived, the matter is now awaiting decision by the Commission.

B. THE COLLATERAL PROCEEDING

In March 1971, while both of the above proceedings were still pending before the Commission, LP&L collaterally attacked the Commission's curtailment jurisdiction by filing an action in the district court seeking an injunction ordering United to deliver to LP&L the full amount of natural gas provided for in LP&L's contract with United. LP&L also claimed that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering United's pipeline facilities used to make deliveries to LP&L's Nine-Mile Point plant (App. A, *infra*, pp. 4a–5a).

Following an *ex parte* hearing, LP&L obtained a temporary restraining order ordering United to deliver full contract quantities of natural gas without curtailment to LP&L's generating plants. After the Commission intervened, the district court dissolved the temporary restraining order and dismissed LP&L's suit on grounds that the Commission has exclusive jurisdiction over curtailments and that LP&L had failed to exhaust its administrative remedies.[3] LP&L then obtained an *ex parte* reinstatement of the temporary restraining order by a judge of the court of appeals; in May 1971 a three-judge panel of the court of appeals refused to dissolve the temporary restraining order and remanded the case to the district court for an evidentiary hearing on the jurisdictional issue (App. D, *infra*, pp. 43a–47a).

Following an evidentiary hearing, the district court again held that the Commission has jurisdiction over United's curtailment program, as well as jurisdiction to determine the certificate controversy, and dismissed the complaint (App. C, *infra*, pp. 30a–42a). On appeal, the court of appeals reversed, holding that the Commission is without jurisdiction to order curtailments

[3] Similar suits initiated by two of United's other direct sale customers have recently been dismissed by another district court. *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2253–71, dismissed January 21, 1972; *Monsanto Co.* v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2037–71, dismissed January 21, 1972. Both cases have been appealed to the United States Court of Appeals for the District of Columbia Circuit, where appellants, relying on the Fifth Circuit's decision in this case, have sought a stay and an injunction pending appeal.

of gas deliveries to direct sales industrial customers (App. A, *infra*, p. 22a). The court noted that under Section 7 of the Act the Commission has jurisdiction to grant initial certificates of public convenience and necessity for direct sales and to authorize abandonment of such sales, but held that between these two extremes, direct sales are immune from federal regulation (*id. at* 16a–22a). While the court stated it was withholding judgment on the "conclusions" reached by the Commission in its opinion in the curtailment proceeding (*id.* at 27a), the court set forth the rationale of the Commission's decision in favor of curtailment jurisdiction and squarely rejected it (*id.* at 6a–7a, 22a).

The court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipeline facilities used to deliver natural gas to LP&L's Nine-Mile Point generating plant. The court reasoned that the flow of gas through such facilities was essentially in intrastate, rather than interstate, commerce and thus was exempt from federal regulation (*id.* at 22a–26a). The claim that the Commission should be given the opportunity to determine in the first instance whether it has jurisdiction over the facilities was rejected (*id.* at 26a).

REASONS FOR GRANTING THE WRITS

The issue presented by these cases is of fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned. The deci-

sion below, which conflicts in principle with prior decisions of this Court, deprives the Commission of jurisdiction to allocate gas transported by interstate pipelines among all consumers in a fair and equitable manner when gas shortages make full deliveries to all customers impossible. Unless the controversy is expeditiously resolved, orderly and just implementation of curtailment programs in the months ahead will be exceedingly difficult. At the present time, 26 cases are pending before the Commission [4] and several cases are pending in the federal courts [5] which will be controlled by a decision on the merits in these cases.

Although we are petitioning for writs of certiorari in both the curtailment and collateral cases, we believe the issue on which we seek review—*i.e.*, the Commis-

[4] Many of these proceedings were initiated in response to an order issued by the Commission (Order No. 431; 36 Fed. Reg. 7505) in the spring of 1971 requiring the submission of curtailment plans by pipelines anticipating a need for curtailments during the current winter. Reproduced as Appendix H, *infra*, p. 93a, is a map showing the pipelines presently in curtailment.

[5] In addition to the collateral attacks by United's customers (see n. 3, *supra*), a suit to enjoin enforcement of a Commission-approved curtailment plan has been filed by a resale customer of another pipeline, maintaining that the Fifth Circuit's decision applies to resale customers as well as to direct sales customers. *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co. and Federal Power Commission*, Civil Action No. 16060 (N.D. Ga.). And in addition to review proceedings pending in the Fifth Circuit, two other appeals from Commission orders in the curtailment proceeding initiated by United are pending. *Monsanto Co.* v. *Federal Power Commission*, n. 1, *supra*; *Mobile Gas Service Corp., et al.* v. *Federal Power Commission*, n. 1, *supra*. In a curtailment proceeding involving Northern Natural Gas Company, an appeal has been filed by Michigan Power Company. *Michigan Power Co.* v. *Federal Power Commission* (C.A.D.C., No. 71-1752).

sion's ultimate authority over curtailments—is squarely presented in the collateral case decided by the court of appeals. Since the court of appeals' decision on the jurisdictional issue in the curtailment case is foreordained by its decision in the collateral case, we urge the Court also to grant a writ of certiorari before judgment in the curtailment case so that the issue of the Commission's jurisdiction will be presented in the context of a full administrative record (see discussion at pp. 20–22, *infra*).

1. In order to appreciate the practical effect of the decision of the court of appeals, some background is necessary. Interstate pipelines which do not have sufficient supplies of natural gas to meet their contractual commitments to their customers are permitted to make emergency purchases for up to 60 days at any price without Commission approval (see Commission Orders Nos. 402 and 402A; 35 Fed. Reg. 7511, 8927; see also 18 C.F.R. 157.22) and for longer periods with Commission authorization (see Commission Order No. 431; 36 Fed. Reg. 7505). Fourteen interstate pipelines have made emergency purchases of natural gas. Seven, including United, are unable to meet their contractual commitments and are in curtailment during the current winter and thereafter (see App. H, *infra*, p. 93a).

Under the decision of the court of appeals, the Commission's authority over curtailments is limited to the allocation among a pipeline's resale customers (*i.e.*, distribution companies serving homes, public buildings and some businesses as well as other pipelines purchasing gas for resale) of the pipeline's

supply of natural gas in excess of the quantity contractually committed to the pipeline's direct sales customers. Controversies arising under any of the provisions of a direct sales contract, including any clauses dealing with conditions for the diminution of service, would be subject to resolution by state or federal courts of competent jurisdiction or state regulatory agencies.[6] As a result, the contractual provisions of a pipeline's direct sales contracts as interpreted by various courts or state agencies, rather than the Commission's judgment as to what is in the public interest in light of *all* contractual arrangements and the needs of *all* customers, would govern the allocation of scarce gas supplies between direct sales industrial users on the one hand, and resale customers, and ultimately home and other consumers, on the other hand.

The record in the curtailment proceeding graphically reveals the possible impact of the court's decision. United predicted that during the current winter it would be unable to meet approximately 20 percent of its peak day commitments of about 6,000,000 thousand cubic feet (Mcf) and, in fact, could fall short on

[6] There is serious doubt, however, whether state authorities have the requisite power to act in this area, even assuming that the Commission is without jurisdiction. Since the delivery of natural gas to any one customer or class of customers of a pipeline in curtailment necessarily results in a diversion of gas from another customer or class of customers, the impact of a state court or state regulatory agency order to deliver gas to direct users (in one state) would affect interstate commerce and arguably lie beyond state jurisdiction. See, *e.g.*, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575; *Pennsylvania* v. *West Virginia*, 262 U.S. 553.

cold days by as much as 1,500,000 Mcf per day of meeting the historical (based on past deliveries rather than on contractual commitments) needs of its customers (R. 4106–4107; Ex. 29, R. 6039).[7] Under United's proposed curtailment plan, historical deliveries to direct sales customers could be curtailed up to 933,000 Mcf on cold days; resale customer deliveries could be curtailed up to 560,000 Mcf on cold days (Ex. 121, R. 6405).

If the Commission lacks authority to approve curtailments to direct sales customers and those customers obtain court orders enjoining United from curtailing deliveries from past historical levels, the distribution companies and other pipelines could be exposed to an additional curtailment of up to 933,000 Mcf per day on cold days. Moreover, in the event the courts required United to deliver to its direct sales customers the full volumes of gas specified in its contracts with such customers (as opposed to historical volumes), an additional 750,000 Mcf per day would have to be subtracted from deliveries to resale customers, thus possibly exposing such customers to a total curtailment of 2,250,000 Mcf per day (750,000 plus 1,500,000 Mcf per day) (Ex. 43, R. 6102–6109; Ex. 130, R. 6463–6468). Evidence in the curtailment case indicates that the maximum curtailments that United's resale customers could absorb without jeopardizing deliveries to homes, schools, hospitals, public buildings and other small consumers is in the range of 650,000 Mcf per day (Ex. 121, R. 6406).

[7] "R." refers to the record before the Commission in the curtailment proceeding as certified to the court of appeals in connection with the pending petitions for review.

United is not the only major pipeline faced with this serious jurisdictional gap. Reproduced as Appendix I, *infra,* p. 95a, is a map indicating the major interstate pipelines whose direct customers account for 7.6 to 100 percent of their total sales in 1970 as reported by the pipelines on FPC Form 2, pursuant to 18 C.F.R. 260.1.

2. Under a proper analysis of the Natural Gas Act, we submit, the Commission has jurisdiction over curtailments by interstate pipelines of natural gas deliveries to direct sales customers. Section 1(b) (15 U.S.C. 717(b)) specifies that the Act's provisions apply to

> * * * the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas * * *.

Thus, while the application of the Act to *sales* is limited to sales of interstate natural gas for resale, the Act applies without limitation to the transportation of all gas in interstate commerce and to natural gas companies engaged in such transportation.

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507, 523, this Court expressly stated that the curtailment of service to direct sales customers is a matter "largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to

control * * *." And in *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 28, the Court reaffirmed its conclusions on curtailments contained in the *Panhandle* decision and stated that

> * * * when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation.

As the Court recognized, the problem of curtailments, which involves vast interstate pipeline complexes (see App. H, *infra*, p. 93a), presents a compelling need for federal regulation.[8]

Moreover, when Section 1(b) is read in conjunction with other provisions of the Act, the scope of the Commission's authority over curtailments becomes clear. Section 4(b) of the Act (15 U.S.C. 717c(b)) provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2)

[8] See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473, where the Court held that even though a company made only direct sales of natural gas, it was nevertheless engaged in the transportation of natural gas in interstate commerce and was thus a "natural gas company" subject to the Commission's accounting regulations and the reporting requirements of the Act.

> maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

And under Section 5(a) (15 U.S.C. 717d(a)):

> Whenever the Commission * * * shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *.[9]

These substantive provisions are not limited in application to sales of natural gas, but cover the "transportation" of gas as well; similarly the proscription of unreasonable differences between classes of service is not confined to "rates", but extends to "service [and] facilities." To the extent that a pipeline's cur-

[9] Compare Section 7(c) of the Act (15 U.S.C. 717f(c)), which prohibits a natural gas company from engaging "in the transportation or sale of natural gas, subject to the jurisdiction of the Commission" without a certificate of public convenience and necessity. Although the court of appeals acknowledged (App. A, *infra*, p. 16a) that Section 7 applies to direct sales customers as well as to customers purchasing for resale, it denied the same scope to the similarly worded Sections 4 and 5.

tailment plan violated the standards of Section 4(b) by granting undue preferences to one class of customers—including the direct sales customers—over another, the Commission would appear to have ample authority under both Sections 4 and 5 to correct the practice.[10]

Finally, the Commission's curtailment authority is supported by the broad, residual powers conferred on it by Section 16 of the Act (15 U.S.C. 717o), which provides, in pertinent part:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *

Referring to Section 16 in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, this Court stated:

> * * * the width of administrative authority must be measured in part by the purposes for which it was conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.

3. The court of appeals also erred in ruling in the collateral proceeding that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipe-

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[10] Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 647, where this Court noted that it "is clear that contracts covering direct industrial sales" come within the portion of Section 5(a) referring to "any rule, regulation, practice, or contract *affecting*" (emphasis added) any rate, charge or classification imposed by a natural gas company.

line facilities used to deliver natural gas to LP&L's Nine-Mile Point generating plant. By failing to defer to the Commission for an initial determination—subject to later judicial review—whether the presence of interstate gas on the facilities in controversy brings the facilities within the Commission's jurisdiction, the court unjustifiably refused to follow the long standing rule that questions relating to an agency's subject matter jurisdiction should be determined by the agency in the first instance. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. We urge the Court to review this aspect of the court of appeals' decision as well as the court's disposition of the curtailment issue.

4. In our view, as we have noted, the question of the Commission's authority over curtailments is squarely presented in the collateral case decided by the court of appeals. Until the Commission issued its opinion in the curtailment proceeding, there was a substantial issue whether the courts should defer to the Commission for an initial determination of the Commission's curtailment jurisdiction. That issue, however, became unimportant in this case when the Commission's curtailment opinion came down prior to the court of appeals' decision. The parties in the collateral proceeding referred to the Commission's opinion in their briefs and the court of appeals, in its opinion, considered and squarely rejected the rationale of the agency opinion (App. A, *infra*, pp. 6a–7a, 22a). Accordingly, we are not including that issue (whether the courts should initially defer to the Com-

mission's determination of its curtailment jurisdiction) in the questions presented in the present petition for certiorari.

To avoid any possible doubt that the curtailment jurisdiction issue is squarely presented and to present that issue in the context of a fuller record, however, we urge the Court also to grant certiorari before judgment in the proceedings for review of the Commission's curtailment opinion now pending before the court of appeals.[11] To the extent that the petitions for review raise issues in addition to the question of the Commission's basic authority over curtailments of natural gas deliveries to direct sales customers, the cases can be remanded to the court of appeals for further proceedings after disposition of the basic issue by this Court.

This Court's power to issue a writ of certiorari before judgment in cases coming directly to the courts of appeals from administrative agencies has never been definitively determined. See Stern and Gressman, *Supreme Court Practice,* pp. 28–30 (4th ed., 1969). It can perhaps be argued that, in reviewing the agency decision prior to any action by a lower court, this Court would be exercising original, rather than appellate, jurisdiction outside the limits of this Court's original jurisdiction as defined by Article III, Section

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[11] Petitions for review have been filed in the Fifth Circuit by Louisiana Power & Light Co., *et al.*, International Paper Company, Gulf States Utilities Company, Mississippi Power & Light Company, Mississippi Valley Gas Co., *et al.*, and the State of Louisiana, *et al.* By order issued January 28, 1972, the first four cases were consolidated for further proceedings.

2, of the Constitution. In our view, however, review of an agency decision in a case where the agency has acted in a quasi-judicial capacity is appellate in nature since the reviewing court simply "revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison*, 1 Cranch 137, 175. Compare *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U.S. 572, 576. Moreover, judicial review of the Commission's determination here is based on a record compiled before the Commission.

THE COURT SHOULD EXPEDITE CONSIDERATION OF THESE CASES

The potential consequences of the court of appeals' exclusion of direct industrial sales from the Commission's curtailment jurisdiction, and the resulting impact on distributors and home and other consumers have been discussed (pp. 13–16, *supra*) and need not be repeated. The urgency of the situation is such, however, that it is highly desirable that these cases be heard on the merits this spring.

The summer months are critical to the natural gas industry, since it is during this period that storage facilities throughout the country are filled to assure that the ensuing winter's peak-load requirements will be met. If the pipelines will not be in a position this summer to curtail or interrupt deliveries to all their

customers, including their direct sales customers, in accordance with their curtailment plans on file with the Commission, the impact on the resale customers of these pipelines will be severe. Exemption of direct industrial sales from curtailment plans will expose resale customers to a wholly unreasonable curtailment burden (see pp. 14–16, *supra*) and could result in critical shortages to some pipelines and distributors. Moreover, if the cases are not heard until next Term, the fall and early winter months may pass without clarification of the Commission's curtailment jurisdiction, thus further jeopardizing a rational allocation of limited natural gas supplies during the 1972–1973 winter.

Accordingly, we urge the Court to grant our motion for expedited consideration requiring responses to the petitions for writs of certiorari to be filed by February 28, 1972, and establishing a briefing schedule, if one or both of the petitions are granted, that will permit the case or cases to be heard at the April argument session.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari and the motion for expedited consideration should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
GORDON GOOCH,
General Counsel,
LEO E. FORQUER,
Solicitor,
J. RICHARD TIANO,
First Assistant Solicitor,
JOHN P. MATHIS,
GEORGE W. MCHENRY,
Attorneys,
Federal Power Commission.

FEBRUARY 1972.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 71-2550

LOUISIANA POWER & LIGHT COMPANY, PLAINTIFF-APPELLANT

v.

UNITED GAS PIPE LINE COMPANY, ET AL., DEFENDANTS-APPELLEES

FEDERAL POWER COMMISSION, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

[January 14, 1972]

Before THORNBERRY, MORGAN and CLARK, *Circuit Judges.*

CLARK, Circuit Judge.

The present nationwide shortage of natural gas generated this controversy.[1] First, we must make a construction of the Natural Gas Act[2] which will

[1] This is a matter we have judicially noticed as eminent; *see* Southern Louisiana Area Rate Cases v. Federal Power Commission, 428 F. 2d 407 (5th Cir. 1970).

[2] 15 U.S.C.A. § 717-717w.

properly balance that Act's grant of jurisdictional power to the Federal Power Commission (FPC) over the transportation of natural gas in interstate commerce with the equally explicit Congressional directive that the Act shall not apply to so-called direct sales of gas—sales which are for consumptive use by the purchaser rather than for resale to others. This requires a determination of whether the grant of transportation jurisdiction confers a power to the FPC to now recondition certificates of public convenience and necessity it previously issued authorizing the construction and use of pipeline facilities to perform gas sales contracts between an interstate gas pipeline, United Gas Pipeline Company (United), and a utility company, Louisiana Power & Light Company (LP&L), which burns the contract gas under its boilers to generate electricity. Second, we must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility.

On preliminary motions by United and FPC, the district court dismissed LP&L's complaint seeking an injunction requiring United to perform its contracts. The dismissal was based both upon a finding that LP&L had failed to demonstrate irreparable injury and upon the legal conclusion that proceedings pending before the Federal Power Commission, concerned with the same general subject matter, were "well within the [primary] jurisdiction of the FPC." We determine that the lower court erred; both in basing its decision on LP&L's failure to demonstrate irreparable injury at a preliminary hearing on its opponents' motions to dismiss, and in concluding that the FPC's claim of continuing certificate jurisdiction and its claim of jurisdiction over an asserted intrastate facility was free from doubt. We therefore reverse

the order of dismissal and remand this action for further fact development on the issue of irreparable injury.

BACKGROUND

In 1956 LP&L entered into a twenty-year contract with United calling for the delivery of natural gas to be burned under LP&L's boilers at its Sterlington Electric Generating Station in Ouachita Parish, Louisiana. The contract contained a provision entitled "Impairment of Deliveries" which provided that in the event a shortage of gas rendered United unable to supply the full requirements of all of its customers, then gas utilities reselling gas to domestic consumers and electric utilities using gas for the generation of electricity for domestic consumption would be first supplied by United, with any remaining available gas to be prorated among its other customers.

For many years United has also contracted with LP&L to sell it natural gas for LP&L's steam electric generating use at its Nine-Mile Point Generating Station in Jefferson Parish, Louisiana. This contract also contained an impairment of deliveries clause which provided that, in the event a shortage of gas made the available supply inadequate, available gas would be ratably prorated between gas utilities purchasing gas for resale to domestic consumers, and electric utilities using gas to generate electricity for domestic consumers.

Certificates of public convenience and necessity have been issued by the FPC covering all of United's facilities used to make deliveries to LP&L's Sterlington Station.[3] Deliveries to LP&L's Nine-Mile Point

[3] United Gas Pipe Line Co., 3 FPC 863 (1942); United Gas Pipe Line Co., 19 FPC 31 (1957), United Gas Pipe Line Co., 33 FPC 734 (1965), United Gas Pipe Line Co., 37 FPC 399 (1967), United Gas Pipe Line Co., 38 FPC 88 (1967).

Station have never been certificated, since, until recently, all of the gas delivered to this station only traveled in a pipeline system, designated the "Green System," which gathered and disposed of gas wholly within the confines of the State of Louisiana. However, in 1970 United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the "Black System."

In 1970 United petitioned FPC for declaratory approval of a curtailment plan to meet an anticipated shortage of gas during the 1970–71 winter heating season and for an indeterminate time thereafter.[4] LP&L and other direct sales customers of United intervened. In its petition for intervention, LP&L maintained that the proposed curtailment program reached both direct sale and sale for resale customers and would violate the terms in its contracts. LP&L denied that the FPC had jurisdiction to curtail direct sales contract deliveries through previously certificated transportation facilities.

United has also filed an application with the FPC to grant a certificate of public convenience and necessity to utilize the Green System pipeline facilities serving the Nine-Mile Point Station of LP&L. This proceeding bears Docket No. CP 71–89. LP&L has intervened. No decision has been rendered.

In March 1971, LP&L filed a complaint in the district court asserting jurisdiction based on diversity of citizenship. It sought and received a temporary restraining order requiring United to perform its contracts. The day following the issuance of this order, the FPC intervened in the case and the district court reversed its prior restraining order and dismissed the cause for lack of jurisdiction. After the district court

[4] Docket No. RP 71–29.

refused to stay its order of dismissal a single judge and, subsequently, a panel of this Circuit, stayed the dismissal of the district court action and entered an order providing in pertinent part:

> The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other *preliminary* issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence hearing on the jurisdiction of the court and on other appropriate *preliminary* questions. The district court will make appropriate findings of fact and state its conclusions of law. (Emphasis supplied.)

We add emphasis to the above quotation to point up that we did not direct that the court hear the case on its merits at the time it held the required jurisdictional hearing.

On remand, the district court held the hearing mandated and made Findings of Fact which included the following:

> All gas delivered by United to the Sterlington and Nine-Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine-Mile Station are made through the "Green" pipeline which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipeline from the "Black" pipeline. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipeline.
>
> * * * * *
>
> LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out"

which, under certain circumstances, could cover an area as large as the whole State of Louisiana, or, indeed, a several-state area, such as occurred during the notorious "north-east blackout" in 1965. The record is bare of any evidence to support this allegation.

The court additionally noted that LP&L has filed a registration statement with the Securities & Exchange Commission which not only did not disclose the pendency of the subject litigation as a suit which carried the potential of severe service interruptions, but also affirmatively stated that after June 1971 it expected to be able to offset any foreseeable gas curtailment by burning oil at its generating stations.

The Court concluded as a matter of law that the motions to dismiss filed by United and FPC should be granted because LP&L had failed to establish irrepable injury and therefore was not entitled to injunctive relief. It alternatively based its dismissal upon the conclusion that LP&L was required to exhaust its remedies before the FPC rather than pursuing judicial relief since: (1) LP&L had not proved the extent of possible injury which might result from the pursuit of curtailment proceedings before FPC; (2) those curtailment proceedings were well within the jurisdiction of the FPC; and (3) the expertise of the FPC was necessary for the proper consideration and disposition of the issues. All injunctive relief was vacated and the action brought by LP&L was dismissed. The present appeal arises from this action.

During the pendency of this appeal, the FPC rendered its Opinion No. 606 in United's curtailment proceedings, Docket No. RP71-29. In this opinion the Commission concluded that it had plenary authority to allocate the gas supply of jurisdictional pipelines to *all* of the pipeline's customers, including customers who were previously certificated direct sale pur-

chasers under long-term contracts, and that it should make such allocations in the form of tariff orders requiring curtailments of gas deliveries to all users of natural gas which United transported in commerce. The basis of the FPC's reasoning was that its power to make such curtailments was related to its jurisdiction over transportation, and that its transportation jurisdiction "is and must be" of a *continuing* nature rather than being "insignificantly" limited to the initial grant or denial of a certificate of public convenience and necessity to construct the facilities used to make direct sales. The FPC determined that it must have jurisdiction to exert continuing control over the gas sold under such certificated direct sales in order to accord full protection to the public since state commissions could not reasonably be expected to formulate a uniformly fair plan for the apportionment of the scarce commodity. Thus, FPC asserts that the present gas shortage has created "new circumstances" giving rise to the "need" to continuously reevaluate previous certificates to make all pipeline sales fully compensatory and thereby use financial incentive to encourage exploration for and development of new natural gas supplies.

PROOF OF IRREPARABLE INJURY

Both premises for the court's jurisdictional dismissal were based (one in whole and the other in part) on the determination that LP&L had failed to carry the burden of demonstrating its potential injury. In its sworn complaint in the district court, LP&L detailed its assertions of immediate and irreparable damage. In brief paraphrase, its allegations were these: LP&L supplied the electricity it generated to 46 of 64 parishes in Louisiana and had interconnections with all other electrical utility companies in

Louisiana and most of the rural electric cooperatives in that State. Through this network it served the electrical needs of numerous domestic and industrial customers, as well as governmental subdivisions. Through other interconnections, it participated in an area-wide electrical grid network serving over 2,500,000 consumers, which was still further connected to power sources throughout most of the eastern part of the nation. A failure to be able to utilize the full generating capacity of the Sterlington and Nine-Mile Stations at peak demand periods could cause a wide area "black-out" or "brown-out" with damages beyond any means of calculation. It was further asserted that LP&L had relied upon United's contract when it constructed Sterlington Station, which had no full-capacity alternate source of energy for electrical generation and that, so long as United breached its contract commitment by curtailing gas deliveries, LP&L would lose electrical sales which could never be recovered because of the evanescent quality of its stock in trade, electricity, which could not be stored nor could it be delivered at any moment after the immediate demand for it had passed. The loss of such sales would be further irreparable since the fixed cost of basic generating facilities depreciated whether used or not.

The court found that the record on the preliminary hearing of the motions to dismiss for want of subject matter jurisdiction, under Fed.R.Civ.P. 12(d) was bare of any evidence to support the portion of these allegations relating to a possible "black-out" or "brown-out" of electrical power. This finding is correct; just as it is further true that the record is devoid of any evidence to support the remaining verified allegations of irreparable injury through lost sales. But, it is obvious why. At the commencement of the hear-

ing[5] and in ruling on objections during its progress, the court made it abundantly clear that all evidence to be taken should be directed solely to the jurisdictional issue raised by the respective motions to dismiss of United and FPC. Neither the defendant nor the intervenor had answered. No responsive pleadings other than these jurisdictional motions were on file. The case was not then being heard on its merits (or lack of them) as to the ultimate relief prayed for by the plaintiff.

The basic tenet of both prongs of the lower court's ruling—that LP&L had failed to demonstrate it would be harmed by any curtailment of gas deliveries under United's contract—was drawn from the examination and cross-examinations of J. M. Wyatt, a senior vice president of LP&L. On direct examination, Mr. Wyatt testified that at the time of this Rule 12(d) hearing, the Sterlington Station plant had no capability to utilize any alternate fuel other than natural gas and that the Nine-Mile Point Station was equipped to operate only one of its several units, and that unit only on an emergency basis for up to 36 hours, on No. 2 fuel oil. He further testified that after June of 1971 the company expected to have similar emergency capability to operate one unit of its Sterlington plant on such fuel oil. On cross-examination of Mr. Wyatt, counsel for the FPC brought out that registration statements filed by LP&L with the Securities and Exchange Commission contained assertions under the heading "Fuel Supply" which were inconsistent with the anticipated injuries which the complaint asserted would flow from the breach of United's contracts. Counsel for United brought out on his cross-examination of Mr. Wyatt, that LP&L had a separate natural

[5] The hearing commenced with the court's announcement to *United's* counsel: "—you are the mover, so you may proceed."

gas supply contract term supply of 66⅔% of the present fuel energy requirement for the operation of LP&L's Nine-Mile Point station, and that another LP&L-Texaco, Inc. gas contract had been made to cover additional fuel when a new generating unit went on-stream at this plant in 1973.

After an examination of the entire record, this Court concludes that the preliminary hearing record compiled in the court below was limited to a determination of the jurisdiction of the court vis-a-vis the jurisdiction of the FPC. The hearing had a somewhat unique procedural posture due to this Court's stay and remand for expedited disposition of the jurisdictional issue. This factor aids in making it abundantly clear that the court and the parties were proceeding on the assumption that the matter was being heard on defenses as to which the movants and not LP&L had the burden of persuasion.

This is not to say that a party moving for an injunction does not have the burden of showing irreparable injury. We only assert that the mandate of this Court remanded the cause to the district court for an expedited hearing on the jurisdictional issue and on other *preliminary* issues that were appropriate or properly raised. With no pleading challenge whatsoever to the facts stated in the complaint, and without notice of any kind to the parties that the matter was to be heard on its merits, the court improperly based its conclusions of law upon its finding of a failure by LP&L to carry a burden it did not know it was required to meet. *Cf. Nationwide Amusements v. Natin,* —— F. 2d —— (5th Cir. 1971) [No. 71-2299, 1971].

Finally, as to the procedural aspect of this matter, we hold that it was error to use the preliminary hearing proceedings on Rule 12(b) defenses to dispose of

this cause on its underlying factual merits. Except in unusual circumstances, and then only after clear notice this course is improper. *See* 5 Wright and Miller, Federal Practice and Procedure § 1373; 2A J. Moore, Federal Practice ¶12.16.

Aside from the procedural problem, the lack-of-proof-of-potential-injury bases for denial of injunctive relief and for requiring exhaustion of FPC remedies cannot stand on the undisputed matters which were developed. The fact that LP&L made statements to the Securities & Exchange Commission which can be read to be inconsistent with its claim that performance of United's natural gas contracts is an essential prerequisite to the operation of its plants, is a matter that could be considered if the defense of estoppel is raised or the equitable defense of unclean hands should become pertinent.[6] All we hold on this appeal is that the language of the filing posed against the sworn facts of the complaint and Wyatt's testimony would, at most, show that LP&L was guilty of misleading the investing public. If that be so, it is another lawsuit. There was no room for concluding from any fact shown in this record that LP&L had some alternate means of generating electricity except on a makeshift basis, or even on that basis, for more than a day and a half.

Of course, proof of this type could be critical if proven facts left room for conflicting inferences as to whether loss of contract gas would indeed result in injury. The Nine-Mile Point Station contract ar-

[6] Before this court, LP&L asserts that its registration statements do not even demonstrate a lack of candor with the Securities & Exchange Commission, since LP&L was entitled to assume that its contract commitment with United would ultimately be honored. However, we expressly eschew *any* hint of a ruling on this matter. It is no more pertinent to our review than it was to the preliminary decision below.

rangement with Texaco, Inc. would similarly present a substantial question in this respect. It apparently shows the ability to obtain ⅔rds of the needed supply of natural gas for this particular station for the next two years, and an even greater percentage of its needs for those years after the additional generating unit becomes operational.

What all of this may mean as to the relationship which the amount of gas contracted to be supplied to the Sterlington and Nine-Mile Point Stations by United bears to LP&L's ability and imperative need to generate electricity both to prevent catastrophic breakdown and irretrievable loss of sales, can only be determined by development of the evidence on the merits. What is the fuel need at each station? What are the alternate sources of energy supply? How much power can be exchanged (and at what ultimate loss or gain to LP&L) through interconnected sources? What are LP&L's usual and the peak demands? The record does not answer any of these questions, or the doubtless many more, that will play into arriving at the final answer.

In sum, we hold the district court erred in finding and concluding upon this record that LP&L had failed to establish that the breach of these contracts would not cause it immediate and irreparable injury, both because it improperly assigned the burden of proof to LP&L at this stage of the proceeding and because the record does not demonstrate that such injury is not likely to occur.

FPC JURISDICTION

THE DIRECT SALES EXCLUSION VIS-A-VIS CONTINUING CERTIFICATE JURISDICTION (THE STERLINGTON STATION ISSUE)

The intent which motivated Congress at the time legislation was enacted must be the lode star con-

stantly guiding the court which is required to construe their enactment. At first blush, it may seem trite to start this draft of the chart of our search for statutory meaning with so basic an anxiom. But the changed circumstances of a new era are claimed in the strongest terms to have created an urgent *"need"* for the recognition of an authority to extend a granted power so deeply into an area where agency jurisdiction was expressly denied that, to paraphrase an old song, accentuating the affirmative eliminates the negative. This we cannot do. Such action does not fill in statutory interstices or resolve ambiguities in a law. It selects between competing policies which have been legislatively recognized in the same enactment and have been court-declared not only to be separate subjects of regulation, but also to have "independent and equally important places in the Act." *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 *reh. denied* 339 U.S. 905 (1950).[7] Such choices of policy belong to the Congress alone. In speaking to the effect of new experiences under this very Act and to the identical problem we face, the Supreme Court plainly specified that *Congress* was the institution vested with the power to adjust the law to correct deficiencies which were not originally anticipated. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 522, 68 S.Ct. 190, 92 L.Ed. 128 (1947).

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[7] Subsequent circuit decisions have articulated this principle by stating that while the FPC's power over transportation invests it with limited indirect control over non-jurisdictional direct sales, the grant of power and the reservation of such sales are separate aspects of regulation under the Act. *See e.g.*, United Gas Pipe Line Co. v. Federal Power Commission, 388 F.2d 385 (5th Cir. 1968); Panhandle Eastern Pipe Line Company v. Federal Power Commission, 359 F.2d 675 (8th Cir. 1966).

With our compass oriented to legislative intent, we turn to the Act itself and the authorities which have construed it to date. In the *Panhandle Eastern* decision cited above, the Court, while recognizing the undoubted power of Congress to define the distribution of power over interstate commerce, pointed out that the Natural Gas Act created an articulate legislative program creating a comprehensive regulatory scheme in which federal power complemented, but did not usurp, the existing authority of state regulatory agencies, 332 U.S. at 520. Congress was motivated by a desire to protect consumers against exploitation at the hands of natural gas customers, *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960), but it did not decide that this protection was to be accomplished by arrogating all control over interstate commerce in natural gas to the federal agency. "[M]uch authority was reserved to the States." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 19, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961). Since a complete as well as an harmonious regulatory scheme was envisaged, an intent to leave no area of substance unregulated must also be recognized, and no "attractive gaps" should be created by judicial interpretation. *Id.* However, as Mr. Justice Black wrote in *East Ohio Gas Co.*, supra, the location and breadth of such "gaps" must be adjudged in the light of what rights were defined by court precedents which existed *prior* to the time of legislation and not those since decided or which the courts would decide today. Without such a limit, judicial action would certainly become legislation.

The coverage of the Natural Gas Act has been so succinctly and aptly described by Mr. Justice Rutledge that it would be presumptuous not to quote:

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
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> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to *any other* * * * *sale* * * *." (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.
>
> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise.[8]

As is not uncommon when courts construe legislation over any appreciable time, subsequent decisions have made the clear "line of the statute" more and more crepuscular. One thing can be sharply discerned, the explicit prohibition of the statute denying jurisdiction over direct sales of gas for consumptive use has been consistently narrowed as courts and the FPC have increased the ambit of the jurisdictional grant over interstate transportation of such fuel. This has been done by analyses which recognized broad power in the

[8] Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana, *supra*, 332 U.S. at 516.

FPC to grant certificates of public convenience and necessity in connection with the extension of pipeline facilities to service direct sales outlets.

The most significant decision construing the FPC's certificate jurisdiction is *FPC v. Transcontinental Gas Pipe Line Corp., supra,* which was decided after Congress had amended § 7 of the Act to greatly broaden the ambit of federal power. That case pointed out that in the original Act, § 7[9] restricted certification to instances where a pipeline sought to serve an area already being served by another regulated company. In 1942 § 7 took its present form requiring certification of every facility subject to the jurisdiction of the Commission. The amendment intended to change the certificate function, which formerly looked only to control of competition between regulated pipeline companies, to one which considered both relative end use values and price effect factors.

This extension of the certificate function obviously detracted from the direct sale exclusion, but in *Transcontinental,* the Court affirmed that direct sales remained ". . . not subject to the Commission's jurisdiction *except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis supplied.) Furthermore, in this same opinion, Chief Justice Warren avowed that § 7 powers of the FPC were limited. He observed that the Commission had sought but had not been awarded comprehensive authority over all aspects of gas conservation. His description of the power which Congress had been willing to confer on FPC was the right to exercise a *veto power* over proposed transportation. 365 U.S. at 17.

Against this background matrix of interpretive instruction, we must decide whether a new form of cer-

[9] 15 U.S.C.A. § 717(f).

tificate jurisdiction never heretofore judicially recognized exists under § 7. The issue is: Does the FPC have the authority to modify or condition a certificate of public convenience and necessity issued for facilities used to make a direct sale? Or more briefly stated: Does the Commission have continuing certificate jurisdiction? FPC asserts that it does, and that it *"needs"* to have this jurisdiction to make effective what it conceives to be the full extent of its regulatory powers. We deny this assertion. Even conceding that FPC powers are as broad as it asserts, no amount of need alone can create federal agency power if Congress has not expressly or impliedly granted it. Necessity may be the mother of invention, but need must have the paternal spouse — a legislative grant — to beget agency authority.

The grant of a continuing jurisdiction over certificates already issued might well be implied from the broad powers vested over transportation under § 7. The *Transcontinental* case teaches that FPC has the power to weigh and consider the end uses of gas in order to maintain the greatest benefit from the finite supply of this wasting natural resource. It is further empowered to consider the overall effect which prices to be paid by direct sale purchasers will have on field prices for jurisdictional uses. Such far-reaching powers clearly indicate that episodic State regulation could result in less efficient control than would centralization of all control in the FPC. Considered on these factors alone, the basic rules of statutory interpretation would call for a construction favoring continuing certificate jurisdiction. But! The Act itself expressly proscribes jurisdiction over direct sales and, as to such transactions, the recognition of continuing certificate jurisdiction would do no less than abolish the Act's exception of jurisdiction over sales for con-

sumptive use, which has an equally secure and important place in the structure of the Act.

When any initial certification proceeding is pending before it, even one involving a direct sale, the Commission can exercise a *veto power* over the proposed transaction based upon its judgment as to whether the use proposed to be made is for a valid and efficient use, and whether the price structure would have a deleterious effect in consideration of its overall regulatory scheme. However, as to a non-jurisdictional sale, this power ceases under the Act as it is presently written when the certificate is finally issued, unless and until the right to abandon certificated facilities is requested.

Not only do we fail to find any precedent for establishing a new type of FPC authority in between its § 7 (c)[10] veto power over the initial authorization to begin the use of a facility to transport natural gas in interstate commerce and § 7 (b)'s[11] requirement that FPC authorization be obtained for abandonment of

[10] In pertinent part, this section provides: "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . . ."

[11] (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

such facilities,[12] we find clear authority that no such continuing control over non-jurisdictional sales exists. The rationale of our own decision in *Hunt Oil Company v. Federal Power Commission,* 334 F.2d 474 (5th Cir. 1964), indicates that a certificate has a permanency that is free from continuous FPC adjustment and control. In that case when we determined that the FPC had erred in refusing to permit a state public service commission to intervene in a proceeding which had resulted in the issuance of a certificate of public convenience and necessity, we not only authorized such intervention but required the FPC to set the certificate aside and start the proceedings anew. If there was a continuing revisory power in the Commission, the vacation of the certificate would have been unnecessary since the intervenor's rights could have been accommodated by adjusting the certificate.

Even stronger authority is found in the precedents from other circuits. In *Granite City Steel Company* v. *Federal Power Commission,* 320 F.2d 711 (D.C. Cir. 1963), that court set aside an FPC order attempting to reallocate gas supplies between direct and resale sale customers. Although this proceeding relied on the proscription of § 7(a) forbidding the FPC to compel a natural gas company to sell gas when such a sale would impair the company's ability to adequately serve existing customers, it is squarely based on the premise that, absent any § 7(b) issue of abandonment, a certificated direct sale cannot be indirectly controlled by the FPC. It is also worthy of note that the court observed that matters occurring after the Commission enters an order cannot be used to retroactively validate that order. Certainly the converse is equally logical—matters occurring after the issuance of a

[12] *See.* United Gas Pipe Line Company v. Federal Power Commission, 385 U.S. 83, 87 S.Ct. 265; 17 L.Ed.2d 181 (1966)

certificate cannot be used to invalidate the certificate, unless the Act confers a source of continuing authority to revise and amend that certificate. In *Colorado Interstate Gas Company* v. *Federal Power Commission*, 185 F.2d 357 (3rd Cir. 1950), the court quoted the identical language from the Supreme Court's opinion in *Panhandle Eastern Pipe Line Co., supra*, that we quoted above and then stated:

> Nothing need be added to this clear statement of the coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales.

Yet this is precisely what the Commission has undertaken to do in the situation at bar. Its opinion No. 606 requires United to file a plan for the curtailment of direct sales, including those made to LP&L under these contracts in the form of new and amended tariff sheets. *See also City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31 (D.C. Cir. 1954).

Panhandle Eastern Pipe Line Co. v. *FPC*, 232 F. 2d 467 (3rd Cir. 1956) is not to the contrary. In that case the Federal Power Commission had granted a pipeline company *conditional* certificates and, before the certificates were made final it required the company to

file tariffs which contained interruptible priorities for excess gas. After this requirement was made by FPC, the pipeline company acquired new direct sales customers to absorb its excess gas supply and thereby attempted to circumvent the restriction. The Court refused to allow this negation of the FPC's requirement. This case turned upon the recognized jurisdiction vested in the Commission to consider end use and price factors in determining *initial* permanent certification, and not upon any recognition of a right of continuing certificate jurisdiction. The court distinguished rather than overruling or modifying its prior opinion in *Colorado Interstate Gas Company, supra.*

We also distinguish the 6th Circuit's 1949 decisions denying specific performance in one instance and injunctive relief in another as to disputes between a pipeline company and a purchaser of natural gas for resale. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, and *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942. Authority over the interstate gas sale of a pipeline company and a purchaser for resale which was sought to be court-litigated, was clearly vested in the FPC. That is not the case here.

The Commission contends that the provisions of § 4 (b),[13] which prohibit regulated pipeline companies from granting undue preferences respecting transportation of gas subject to the Act, when coupled with

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[13] No natural-gas Company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 USCA 717c(b).

§ 5(a),[14] authorizing FPC elimination of such practices, grant the authority to exercise continuing supervisory authority over all aspects of certificated direct sales transactions. This contention is but another form of the proposition advanced under § 7, which we have dealt with above. Carried as far as the FPC urges, it would bring the agency's transportation authority into irreconcilable conflict with the Act's equally viable express direct sale reservation.

Summarizing, we hold that the FPC has no form of continuing certificate jurisdiction over direct sales to customers of interstate pipeline companies. It has the initial right to issue or veto a certificate of public convenience and necessity and it must give its approval to the abandonment of the use of the certificated facilities, but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention.

HAS THE "GREEN SYSTEM" BECOME INTERSTATE? (THE NINE-MILE STATION ISSUE)

There is no dispute in the record as to any fact bearing on this point.

All of the gas moving to the Nine-Mile Point Generating Station is delivered through the Green pipeline system, which is located entirely within the State of Louisiana. All gas consumed at the station is produced in Louisiana. During 1970 United chose to fulfill 2.6% of its contract commitment with gas which was flowed a portion of its way from certain

[14] "Whenever the Commission . . . shall find . . . that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." (15 USCA 717d(a).)

Louisiana wells to a valve connection to the Green system, through United's Black (interstate) pipeline system. It is particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, the two systems are otherwise entirely separate facilities. Approximately 4,000,000 Mcf units of gas were added to the Green system from the Black system in 1970 out of a total of more than 155,000,000 Mcf units which were delivered by the Green system that year. Through an affiliate, United controlled gas wells in Louisiana (which wells were equipped to deliver fuel to both the Black and Green systems, but in fact delivered only to the Black system) that produced more than the entire amount of gas diverted from the Black system into the Green system in 1970.

United and the FPC rely upon this circuit's holding in *Louisiana Public Service Commission* v. *FPC*, 359 F.2d 525 (5th Cir. 1966), commonly called the Florida Parishes case to show the Green system must now be certificated. LP&L argues that since United had within its control the power to meet its obligations to Green system customers using only intrastate gas, the fact that it chose at times to co-mingle a small amount of otherwise intrastate gas with interstate gas and then redeliver it to the Green system, distinguishes the Florida Parishes situation and gives United no basis for seeking to transfer the Green system from Louisiana to federal control.

In determining whether a particular gas delivery system is subject to federal regulation neither contract stipulations nor other conventions or legal fic-

tions control. The court must examine "the anatomy of the pipeline system to discover the channel of constant flow" to see if, in fact, gas crosses a state line at any stage of its movement from wellhead to ultimate consumption. If it does, it is interstate gas. *People of the State of Calif.* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965); *FPC* v. *Amarada Petroleum Corp.*, 379 U.S. 687, 85 S.Ct. 632, 13 L.Ed.2d 605, *reh. denied* 380 U.S. 959, 989, 85 S.Ct. 1081, 1327, 13 L.Ed.2d 976, 14 L.Ed2d 283 (1965).

The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from the Green system is concerned, is essentially within the State of Louisiana. There is no attempt here to clothe interstate gas with an intrastate or non-jurisdictional sale character by contract language as was present in the *Lo-Vaca* and *Amarada* cases, *supra*. The intrastate character of this sale is based on substance—the physical movement of gas—not on any formalism or technicality.

The Florida Parishes case is equally factually distinguishable. There, gas from Louisiana wells was collected and delivered into large high-pressure gas transmissions mains which transported substantial volumes of gas in interstate commerce to points in Mississippi and Alabama. Lateral connections from these main pipelines were used to serve towns in Louisiana. The court described the lines as "part of

a fully integrated system by means of which United transports and sells gas from the states of Texas, Louisiana and Mississippi to industrial customers, pipeline's and local distributors to thos states and in Alabama and Florida." An analysis of the anatomy of constant flow in the single system which served these towns demonstrated that gas had to move through interstate facilities to reach them. They did not receive their gas through a distinct and geographically localized system such as the Green system here.[15] The *Amarada* case also is physically distinct. Although more of the gas which the contracts there attempted to classify as intrastate actually flowed in interstate commerce in the summer months, a substantial volume flowed in the winter months also. Thus, analysis showed a constancy of interstate movement. The *Lo-Vaca* case presented an attempt to contractually formalize two gas sales which moved through an interstate pipeline as direct sales and therefore exempt from regulation. The Court disregarded the contract language and looked to see, not only that these sales were only a portion of the volume of interstate gas moving in a single system, but also that a portion of this gas was in fact resold outside of the state where it was produced.

In contra-distinction to each of these cases, the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the

[15] In fact, our Florida Parishes opinion was careful to point out: "the question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the commission has not asserted jurisdiction."

Green system is substantially and essentially a localized matter committted to Louisiana's jurisdiction.[16]

DO FPC PROCEEDINGS BAR COURT RELIEF?

Both United and the FPC contend that the curtailment proceedings in Docket No. RP 71–29 and the certificate proceedings in Docket No. CP 71–89 are within the jurisdiction of the FPC and that the court was correct in dismissing the present action. All parties cite numerous precedents, most from the Supreme Court. An attempt at rationalization would needlessly lengthen this opinion. The entire area has been thoroughly analyzed by a leading text in the field. It collects and discusses most of the authorities relied on by both sides. It was relied upon by the court below and we rely upon it here. *See* 3 *K.* Davis, Administrative Law Treatise §§ 20.01 through 20.03.

Because we hold the lower court erred in its holding regarding potential injury and in its views as to primacy of agency jurisdiction, we arrive at a different result in applying Professor Davis' three-part test (§ 20.03).

See Bailey v. United States, — F.2d — (5th Cir. 1971) [No. 71–1731, December 8, 1971], and *cf. United States v. Hernandez,* — F.2d — (5th Cir. 1971) [No. 71–1656, December 27, 1971].

IS THIS APPEAL MOOT?

United also urges that the rendition of the FPC's opinion No. 606 has rendered the present action moot.

[16] P&L has urged that the clearly erroneous review standard of Fed.R.Civ.P. 52(b) must be applied here. We note, however, our ruling does not involve any disagreement with facts found by the district court. We only differ with the interpretation he places on undisputed evidence. Such interpretations are reviewable "free from the restraining impact of the so-called 'clearly erroneous' rule". See B & M Company v. United States F. 2d ((5th Cir. 1971) (71–1320 December 1, 1971).)

We disagree. That opinion is subject to court review under § 19 of the Act.[17] An appeal has been taken by LP&L to this court from Opinion No. 606 and is now pending as Cause No. 71–3429. Thus, there is an unusual confluence of reviews in this court in the matter *sub judice*. However, until affirmance upon the completion of court review, FPC Opinion No. 606 is not a final determination of the issues presented. It would be a strange, Frankenstein sort of legislative delegation that would empower the agency it creates to declare its own extent. Without at all intimating what weight should ultimately be assigned to the conclusions of Opinion No. 606, we are firm in our conviction that it does not oust the adjudicatory power of a court that has reviewing authority over both the court and the agency proceedings.[18]

CONCLUSION

LP&L had no burden to demonstrate that its allegations of irreparable injury were correct on the preliminary hearing of its opponents' motions to dismiss. The FPC lacked jurisdiction over the previously certificated direct sales to Sterlington, and over the intrastate sales at Nine-Mile Point, therefore declining jurisdiction and requiring exhaustion was error. The order dismissing this cause is reversed and the cause is remanded with directions to expedite the hearing and disposition of this cause on its merits.

REVERSED and REMANDED, *with directions*.

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[17] 15 USCA 717r.

[18] If Opinion No. 606 has any instant effect it may be contrary to United's urgings. In the sense that it is a final agency action, its finality could militate against United's claim that the agency's primary jurisdiction still bars court action. However, without pausing to consider the ramifications of collateral versus direct review rights since both court and agency action are before us now, we express no opinion on this aspect of the matter.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

October Term, 1971

No. 71-2550

D.C. Docket No. 16637

LOUISIANA POWER & LIGHT COMPANY,
PLAINTIFF-APPELLANT

v.

UNITED GAS PIPE LINE COMPANY, ET AL.,
DEFENDANTS-APPELLEES,

FEDERAL POWER COMMISSION, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

Before THORNBERRY, MORGAN and CLARK, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to expedite the hearing and disposition of this cause on its merits;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

JANUARY 14, 1972.

APPENDIX C

In the United States District Court for the Western District of Louisiana

MONROE DIVISION

Civil Action No. 16637

LOUISIANA POWER & LIGHT COMPANY

v.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC.

For Plaintiff:
Messrs.
Thomas W. Leigh
Theus, Grisham, Davis & Leigh
P.O. Box 1671
Monroe, Louisiana, 71203

Andrew P. Carter
Monroe & Lemann
1424 Whitney Building
New Orleans, Louisiana

For Defendants:
John T. Guyton
P.O. Box 1574
Shreveport, Louisiana 71102

William R. Choate
Baker & Botts
#1 Shell Place
Houston, Texas

NAUMAN S. SCOTT, *Judge*:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an injunctive proceeding brought by Louisiana Power and Light Company (LPL) aginst defendants United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) to restrain and enjoin the defendants from curtailing the supply of gas to plaintiff's Sterlington and Nine Mile Point generating stations in Louisiana and ordering defendants to deliver natural gas to plaintiff in accordance with the provisions of the current contracts between LPL and United.

LPL is a Florida corporation having its principal place of business in the State of Louisiana and is a "public utility" within the meaning of the Federal Power Act, 16 U.S.C. 791(a) *et seq.* and is the owner and operator of the Sterlington and Nine Mile Point electric generating plants previously mentioned.

Pennzoil and its wholly-owned subsidiary, United, are Delaware corporations having their principal place of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in states including Louisiana, Texas and Mississippi and also delivers to interstate pipe line companies for resale. United has been furnishing natural gas to LPL at both the Nine Mile Point Station and the Sterlington Station under contract for many years.

JURISDICTION

LPL asserts that this Court has jurisdiction under 28 U.S.C. 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000.00, and is between citizens of different states.

THE ISSUE

Pennzoil, United and the Intervenor, Federal Power Commission (FPC) dispute this Court's jurisdiction and have filed motions to dismiss on the contention that this matter involves a proceeding (curtailment of natural gas) which is presently before the FPC, that LPL is an active participant and a party to these proceedings before the Commission, and that the FPC has exclusive jurisdiction under Sections 4 (b), 5(a), and 15 of the Natural Gas Act [15 U.S.C. 717(c), 717(d), and 717(o)].

FINDINGS OF FACT

1. United has supplied gas to LPL's Sterlington Station under contracts which include a provision entitled "Impairment of Deliveries" as follows:

> In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers.

2. United has supplied gas to LPL's Nine Mile Point Station under contracts containing provisions entitled "Impairment of Deliveries" as follows:

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers

shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers.

3. It is conceded that LPL is an industrial consumer and utilizes the gas delivered to it to generate the electric power at its Sterlington and Nine Mile Point stations and not for the purpose of resale.

4. All gas delivered by United to the Sterlington and Nine Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine Mile Station are made through the "Green" Pipe line which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipe line from the "Black" pipe line. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipe line. An application is presently pending before the Federal Power Commission (RP71-89) to certify the "Green" pipe line.

5. United filed with the FPC on October 26, 1970 a petition for a declaratory order to curtail gas deliveries during the winter months (November 1 to April 1) on a ratable basis and in the following order: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic customers, and (3) gas used by domestic consumers. United alleged that

the curtailment was made necessary because the gas supply was insufficient to meet its contract requirements. Attached to the petition are exhibits including exhibits showing the United customers affected by the proposed curtailment, as follows:

	Number
Jackson Area:	
Industrials	6
Power Plants	4
Pipelines	2
City Gates	1
Mobile-Pensacola Area:	
Industrials	17
Power Plants	2
City Gates	3
Shreveport Area:	
Industrials	5
Power Plant	1
Pipelines	6
City Gates	2
New Orleans Area:	
Industrials	4
Power Plants	3
City Gates	2
Lafayette Area:	
Industrials	2
Power Plants	1

These are the parties (customers) affected by the FPC proceeding RP71–29 who are not parties to this suit.

6. LPL filed its petition to intervene in RP71–29 on November 25, 1970 stating the "impairment of deliveries" articles of its contracts with United. It also stated its proposed curtailment violated these contracts; that the FPC did not have jurisdiction over United's sales to LPL because they constitute "direct sales" which are exempt under Section 1(b) of the Natural Gas Act and requests to participate in the hearing without waiving these objections. (FPC Exhibit 3, Item 5).

7. The FPC approved United's curtailment program for the 1970–71 winter season by order in FPC Docket No. RP71–29 dated December 29, 1970 (FPC

Exhibit 3, Item 7). This order was issued as a result of the settlement between the parties, including LPL.

8. United filed a supplemental petition in RP71–29 on February 22, 1971 for the extension of its curtailment program from April 1, 1971 through October 31, 1971 (FPC Exhibit 8, Item 3). The record does not disclose the number or identity of intervenors, including LPL, who intervened prior to November 25, 1970 in RP71–29, however, an order was issued March 10, 1971 permitting the intervention by Aluminum Company of America, Boise Southern Company, Container Corporation of America, Marquette Cement Manufacturing Company, National Gypsum Company, New Jersey Natural Gas Company, Scott Paper Company, Transcontinental Gas Pipeline Corporation and United Gas, Inc., and on April 12, 1971 an order issued permitting the intervention of the City of Pensacola, Florida, et al., Clarke-Mobile Counties Gas District, General Services Administration, Northern Illinois Gas Company and Mississippi Public Service Commission (FPC Exhibit 3, Items 9 & 10).

9. LPL has not denied United's assertion that its supply of gas is inadequate to meet its present and impending gas delivery commitments. It has, in fact, agreed to the curtailment approved in the order of December 29, referred to in Finding 7 above. The fact that the Natural Gas Transmission Industry has recently experienced a decline in the ratio of crude natural gas reserves to annual volume of consumption caused in part by the increasing demand for natural gas by customers and the declining rate of additions to the natural gas reserves has been judicially noticed by the Fifth Circuit, *Austral Oil Co. v. Federal Pwer Comm'n.*, 428 F.2d 405 (5th Cir.), Cert. denied, 400 U.S.C. 950 (1970) (Southern Louisiana Area Rate Cases).

10. FPC Order No. 431 directed interstate pipe lines, including United, to take steps, including filling storage fields, in order to insure capacities to meet the heating season demands for the winter of 1971–72 (November 1, 1971 to March 31, 1972). The Order further directed the pipe lines to file plans within thirty days indicating the way in which the pipe lines proposed to meet the winter heating season demands. United filed its response on May 17, 1971; the Commission docketed the response under FPC Docket No. RP71–120 and then on May 28, 1971 order Docket No. RP71–120 consolidated for hearing and decision with Docket No. RP71–29. That order provided that persons who are parties to the proceeding in Docket No. RP71–29 will be deemed to be parties in the consolidation and need not file to intervene in Docket No. RP71–120.

11. LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana or, indeed, a several-state area such as occurred during the notorious "northeast blackout" in 1965. The record is bare of any evidence to support this allegation.[1] In fact, in a registration statement filed by LPL with the Securities and Exchange Commission on February 19, 1971, the following statement was made:

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[1] Mr. J. M. Wyatt, Vice president of LPL, testified as follows when cross-examined by Mr. Gooch, representing the FPC:

"By Mr. Gooch:

Q. All right, sir. Now let's look under such things as litigation and regulations in the registration statement filed by the SEC. Mr. Carter has just said that they were not going to assume they would lose any suits. Would you show me anywhere in this registration statement filed in April, where Mr. Carter even disclosed to the public that there was a suit pend-

"FUEL SUPPLY. The Company's primary fuel is natural gas. Two of the Company's three major generating stations are outfitted to burn oil as a standby fuel, and the third station is presently being modified to allow the burning of oil as a standby fuel and this modification is scheduled for completion by June 1971. The Company has firm contracts for an adequate supply of gas for all generating capacity which is or will be operational prior to 1974 (3404 MW), which contracts have various expiration dates from 1978 to 1993. During the winter of 1970–71 gas was curtailed to some extent by one supplier who supplies gas to approximately 550 MW of generating capability. After June 1971 the Company expects to be able to offset any foreseeable gas curtailment by burning oil. The supply of fuel for generating units that will

ing which could cause Louisiana Power and Light Company to suffer brown-outs and black-outs if this allegation were true?

A. If I understand your question, I don't see why it would be necessary to notify, because there was nothing involved here that would cause brown-outs or black-outs on this suit.

Q. Nothing involved in the suit?

A. In the suit that I am looking at here, if I understand your question.

Q. My question is—is the suit that we are here in Court for today, do you see that disclosed anywhere, to the public, that it is pending?

A. No, it is not in here.

Q. All right. Now, would you please look at the date of this certificate?

A. Yes.

Q. Will you tell the Court what this is?

A. May 19, 1971.

Q. Are you aware of the filing with the SEC that would either call to the attention the pendency of this suit to those who may be interested in purchasing Louisiana Power and Light securities or reporting any change in your fuel oil situation subsequent to May 19, 1971?

A. I am not aware of it." (Tr. p. 103).

become operational in 1974 and thereafter is being negotiated at this time." FPC Exhibit 21.

12. On March 31, 1971, LPL, although it was an active participant in the curtailment proceeding before the FPC, filed its complaint in this Court, seeking to enjoin United's curtailment program insofar as it affected LPL's Sterlington and Nine-Mile Point Stations. The trial Court, after considering the pleadings of LPL and the briefs and arguments of its counsel granted a Temporary Restraining Order on April 27, 1971.

13. April 28, 1971, the FPC intervened and filed a Motion to Dismiss for lack of subject matter jurisdiction. United-Pennzoil, on April 29, 1971, filed its Motion to Dismiss.

14. The Court considering the additional pleadings then before it, dissolved the temporary restraining order on April 29, 1971 and dismissed the case for lack of jurisdiction. LPL filed a Notice of Appeal and moved for a stay order which the Court refused. The matter is now before this Court on an Order of the Fifth Circuit Court of Appeals dated May 14, 1971 vacating the trial Court's judgment of dismissal and remanding the case to the District Court for an expedited hearing on the jurisdictional issue and such other preliminary issues as might be properly raised.

15. The original trial judge having recused himself, the matter was assigned to this Court for hearing and a full evidentiary hearing was conducted on May 27, 1971.

CONCLUSIONS OF LAW

LPL seeks an injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LPL in breach of United's contracts with LPL, and ordering said companies to deliver

natural gas to LPL in accordance with the provisions of said contracts.

LPL is not entitled to injunctive relief unless it clearly establishes that it is threatened with irreparable injury. It alleges that its Sterlington Station has no alternative source of energy (Complaint Paragraph 17) and that the implementation of the curtailment might result in an extensive "Brown-out" or "Black-out" (Complaint Paragraph 16). LPL has failed to establish irreparable injury (Findings of Fact No. 11) and therefore is not entitled to injunctive relief. However, the Court does not choose to rest judgment solely on these grounds, since the Court of Appeals has directed that a specific finding should be made on the jurisdictional issue.

LPL forcefully contends that this Court has primary jurisdiction and that the FPC lacks jurisdiction because (1) the gas delivered to the Nine Mile Point Station is "intrastate gas" not subject to the jurisdiction of the FPC and (2) direct sales such as the sales from United to LPL are exempt from the jurisdiction of the Commission under the provisions of Section 1(b) of the Natural Gas Act (15 U.S.C. 717).

It is not clearly established by the record that the gas delivered to the Nine Mile Point Station is "intrastate gas", since some "interstate gas" is dumped into the system which supplies the Nine Mile Point Station (Findings of Fact No. 4). The determination of this question is within the fundamental jurisdiction of the FPC, requires the expertise of that agency and is presently pending before that agency in Docket No. RP71-89. The same problems were properly disposed of in the Florida Parishes cases, In the Matter of United Gas Pipe Line Company, Docket No. CP62-161, 30 FPC 560, affirmed on appeal, sub nom., *Louisiana Public Service Commission et al v. Federal*

Power Commission et al., 359 F. 2d 525, cert. denied, 385 U.S. 833, 17 L. Ed. 68, 87 S. Ct. 73.

LPL's second contention is predicated on a finding that the question at issue is the violation of provisions of its direct sales contract with United. However, United's application to the FPC in RP71–29 is couched in terms of a curtailment proceeding (FPC Exhibit 3, Item 1). The exhibits and testimony pertain to volumes of gas—supply and delivery. It seems fairly obvious that if the Court required delivery of the full gas contract commitment to LPL, the gas supply available to United's other customers would be reduced and the curtailment of gas supply to other customers would be proportionately affected. Thus all of United's customers have an interest, including more than 50 intervenors in RP71–29. A cursory examination of the testimony and the exhibits produced at the hearing before this Court on May 27 will demonstrate the complexities and the technical nature of the matters involved in United's application and the special expertise required to resolve it. This is a curtailment proceeding. The proposed curtailment program certainly affects deliveries to United's customers under direct sales contracts such as LPL. However, this is a collateral effect of the curtailment and does not necessarily convert it into an attempt by the FPC to exert jurisdiction over such direct sales contracts.

The threatened irreparable injury alleged by LPL (possible "brown-out" or "black-out") is related solely to the volume of gas delivered. There is no proof that LPL actually requires its full contract commitment of gas to avoid this consequence. It received less than contract commitments during the winter months of 1970–71 without experiencing such injury. This Court cannot assume, especially in an injunction proceeding, that the full contract commitment of gas

is required by LPL to avoid its alleged injury. The injunction could not be granted if standby fuel, as alleged by defendants, is available. The contracts are strictly collateral to the issue before the Court.

United, Pennzoil and the FPC urge that LPL is not entitled to judicial relief until it has exhausted its administrative remedies in the FPC. The Courts have not uniformly followed this precept. Professor Davis, in his *Administrative Law Treatise,* Volume 3, Section 20.03, Page 69, suggests factors which should be considered in determining whether this precept should be followed:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible."

As noted above, LPL has made no attempt to establish the minimum volume of gas which is required to maintain its service, or that the amount allocated to it under the curtailment program is insufficient to meet its minimum requirements. The contracts are hardly pertinent to these issues. The Court finds that LPL has not proved the extent of possible injury which might result from pursuit of the administrative remedy, that the curtailment proceedings are well within the jurisdiction of the FPC and that the

expertise of the FPC is necessary for the proper consideration and disposition of the issues presented in this proceeding. LPL must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction. *Myers* v. *Bethlehem Steel Corp.*, 303 U.S. 41, 82 L.Ed 638, 58 S.Ct. 459; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 90 L.Ed. 839, 66 S.Ct. 712; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, 91 L.Ed. 1261, 67 S.Ct. 962, rev'g 156 F.2d 821; *Union Oil Co. of California* v. *Federal Power Commission*, 236 F.2d 816 (5th Cir. 1956), Cert. denied, 352 U.S. 696, 1 L.Ed. 323, 77 S.Ct. 360; and *Lone Star Cement Corp.* v. *Federal Trade Commission*, 339 F.2d 505. The FPC is competent to decide its jurisdiction and should do so. *City of Hastings, Nebraska* v. *Federal Power Commission*, C.A.D.C. 221 F.2d 31; *Marine Engineers* v. *Interlake S.S. Co.*, 370 U.S. 173, 8 L.Ed.2d 418, 82 S.Ct. 1237.

The motions of United, Pennzoil and the FPC to dissolve the temporary restraining order and to dismiss this suit are granted and the temporary restraining order heretofore issued on April 27, 1971, is dissolved.

Counsel for defendants United and Pennzoil and for Intervenor FPC immediately shall prepare a proper decree and obtain approval thereof from counsel for plaintiff LPL in accordance with Rule 9 of this Court and present such judgment for signature as expeditiously as possible.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 25th day of June, 1971.

NAUMAN S. SCOTT,
United States District Judge.

APPENDIX D

In the United States Court of Appeals for the Fifth Circuit

No. 71-1773

LOUISIANA POWER & LIGHT COMPANY, PETITIONER-PLAINTIFF

v.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., RESPONDENT

(*Filed May 14, 1971*)

ORDER

Before WISDOM, COLEMAN, and SIMPSON, *Circuit Judges.*

BY THE COURT: This matter arises out of the complaint of the Louisiana Power & Light Company (LPL) against United Gas Pipe Line Company (United) a wholly-owned subsidiary of Pennzoil United Inc., alleging that United breached its contract with LPL for the supply of natural gas to LPL's electrical generating plants at Sterlington and Nine Mile Point in Louisiana. The Federal Power Commission intervened. On April 27, 1971, the district court, having considered only the complaint and brief of LPL, granted a temporary restraining order prohibit-

ing United from violating its contract curtailing its supply of gas to LPL. The order set a hearing on the preliminary injunction for May 11, 1971. United and the Federal Power Commission thereupon moved to dissolve the temporary restraining order and to dismiss the complaint for the following reasons:

> "(1) The complaint fails to state a claim upon which relief can be granted.
>
> (2) The Court lacks jurisdiction over the subject matter, exclusive jurisdiction being vested in the Federal Power Commission under and by virtue of the Natural Gas Act (15 USCA § 717 et seq.).
>
> (3) Because this is a collateral attack upon proceedings now in progress before the Federal Power Commission, to which proceedings Plaintiff is a party, and Plaintiff has failed to exhaust its administrative remedies under the Natural Gas Act."

On April 29, 1971, the district court, without a hearing but after having received briefs from the parties and the intervenor, granted leave to the Federal Power Commission to intervene, dissolved the temporary restraining order, and dismissed the suit for lack of jurisdiction. LPL filed a notice of appeal.

On Saturday morning, May 1, 1971, LPL moved for leave to file writs of mandamus and certiorari and, alternatively, for an expedited appeal. LPL also moved for an injunction pending appeal. These matters were presented ex parte to a single judge (Wisdom, *J.*). In the interest of judiciary economy, he treated these motions as one matter, as this panel does, calling for a stay of the district court's order dismissing the complaint and dissolving the temporary restraining order. Shortly after noon on Saturday, Judge Wisdom declined to pass upon the merits of the

motions but issued a stay, subject to further orders of this Court, until a panel could be convened and conduct a hearing on the merits of LPL's motions. See Rule 8(a) of the Federal Rules of Appellate Procedure and Rule 10(b)(11), Local Rules of the United States Court of Appeals for the Fifth Circuit.

On May 5, 1971, a panel of this Court, consisting of the undersigned judges, conducted a hearing at which counsel for the Federal Power Commission, United, and LPL were present and given an opportunity to argue the case at length. The Court has now had an opportunity to consider the briefs, affidavits, and other papers presented at that hearing and subsequent to the hearing.

We note, first, taking an over-simplified view of the case that the district court had before it as the basis for its decision only the original and amended complaints, the allegations of which must be accepted as true for purposes of a motion to dismiss. According to these allegations, the contract simply involved the direct sale of gas for use or consumption by the purchaser. And such sales are not within the jurisdiction of the Federal Power Commission. The construction of the contract therefore was for the court and United's curtailment of gas deliveries to LPL's plants was a breach of contract, a question within the district court's jurisdiction.

The case, however, is not that simple. It is evident to the Court that there are many disputed issues of fact and mixed issues of fact and law bearing upon a proper interpretation of the contract and a proper construction of the Natural Gas Act, 15 U.S.C. § 717, et seq. Indeed, counsel for the parties argue as if this Court had before it a transcript of testimony, and the district court's findings of fact and conclusions of law. We have concluded therefore that this is the type of

case that requires the district court to take jurisdiction for the purpose of determining if it has jurisdiction. With this end in view the district court is directed to hold a full hearing at which the parties may present evidence bearing upon the jurisdictional issue.

The case is important. LPL contends that curtailment of gas deliveries will have a serious detrimental effect on its customers during its peak season, the summer months. United contends that this is a fight about who gets natural gas when there is not enough to go around; that is a matter peculiarly within the province of the Federal Power Commission. The Commission agrees with United and asserts that an adverse decision in this case will have a severe and detrimental impact upon the natural gas industry and the public which it serves. At this time the Commission is conducting curtailment proceedings to which the LPL is a party.

IT IS THEREFORE ORDERED:

1. Judge Wisdom's order vacating the district court's judgment of dismissal is reaffirmed as the order of this Court.

2. The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other preliminary issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence bearing on the jurisdiction of the court and on other appropriate preliminary questions. The district court will make appropriate findings of fact and state its conclusions of law.

3. Should the district court decide that it has jurisdiction, it will expedite the hearing on the merits. An appeal, if any, will be expedited.

4. This Court continues the stay issued by Judge Wisdom pending the hearing and judgment of the district court.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ABANDONMENT — CERTIFICATES — DIRECT-SALE CONTRACTS — DECLARATORY ORDER — EMERGENCY — GAS SUPPLY — JURISDICTION — PUBLIC INTEREST — SERVICE — TARIFFS — TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* ALBERT B. BROOKE, JR., and PINKNEY WALKER.

UNITED GAS PIPE LINE COMPANY

(Docket Nos. RP71-29, RP71-120, RP71-99)

Opinion No. 606

OPINION AND DECLARATORY ORDER FINDING JURISDICTION, REMANDING SOME ISSUES TO EXAMINER, DISMISSING MOTION TO SEVER, DENYING AND DISMISSING MOTIONS TO ENLARGE SUSPENSION PERIOD, AND DISMISSING PETITION FOR DECLARATORY ORDER TO INTERPRET CONTRACT TERMS

(Issued October 5, 1971)

PER CURIAM:

HISTORY OF PROCEEDINGS

This proceeding was commenced by the filing on October 26, 1970, of a petition in Docket No. RP71-29 by United Gas Pipe Line Company (United) re-

questing a declaratory order from this Commission finding the curtailment plan to be implemented by United in the event of impaired deliveries was consistent and in keeping with Section 12 of the General Terms and Conditions of United's FPC Gas Tariff, First Revised Volume No. 1.[1] United projected a shortage of gas supplies during the 1970–1971 heating season and possibly thereafter which would not be adequate to meet the contract demands of all of its customers. Its curtailment program initially designated three usage categories (later amended to five categories) for purposes of priority of service or its converse, curtailment. These were, in order of the lowest priority and curtailed first—gas used for industrial purposes, including gas to generate electricity for later industrial use; the second lowest category—gas used to generate electricity consumed by domestic customers; and the highest order of priority—gas used by domestic customers.

Motions and answers were filed objecting to United's petition and asking that we decline to render a declaratory order or that we deny United's petition.[2] The Commission recognized the urgency of the

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[1] These provisions are found in United's filed tariff as Original Sheet No. 71 issued on December 1, 1954, effective August 1, 1954, and First Revised Sheet No. 72 issued on October 31, 1969, effective December 16, 1969. United amended its petition on November 20, 1970, requesting the Commission to order Mobile Gas Service Corp. to cease circumventing United's curtailment plan by reselling its allocated volumes to other customers of United.

[2] Mobile Gas Service Corporation (Mobile) filed a motion on November 10, 1970; Texas Eastern Transmission Corporation (Texas Eastern) filed an answer to United's filing on November 23, 1970; Stauffer Chemical Company (Stauffer) protested United's petition on November 25, 1970, and requested that the Commission reallocate gas deliveries under a more constructive and reasonable plan.

questions presented because the heating season had already begun and because United had placed its curtailment program into effect on November 1, 1970, as it was obligated to do. On December 10, 1970, we ordered hearings to commence on December 21, 1970, and the purpose of the hearings was:

> * * * to resolve the questions presented in United's petition, its amendment thereto and the motions, answers, and protests which those two documents filed by United have engendered, and to determine (a) the proper interpretation of Section 12 of the General Terms and Conditions of United's FPC Gas Tariff and whether the curtailment program placed into effect by United on November 1, 1970, is in accordance therewith, (b) whether it would constitute undue discrimination under the provisions of the Natural Gas Act if a curtailment program placed into effect on United's system did not apply equally to the jurisdictional and direct sales customers of United and (c) whether it would be appropriate for the Commission at this time to consider the question of reallocation of United's total gas supply among all of United customers, and if so, on what basis should such reallocation be made * * *.

United thereafter proposed an interim settlement which was accepted by all parties except Monsanto Chemical Corporation. The Commission approved the settlement on December 29, 1970.[3] In light of the emergency situation which confronted United, we approved the interim curtailment plan to remove uncertainty of operation on United's system during the winter heating season which was then in progress. This settlement tended to meet the objections of the interveners,

[3] The Commission denied Monsanto's petition for rehearing of the settlement approval on February 26, 1971. Monsanto's appeal to the United States Court of Appeals for the District of Columbia is pending in Docket No. 71-1306.

provided for cooperation in the curtailment program through March 31, 1971, and provided that United would attempt to make spot purchases of gas, if possible. It also resolved temporarily the dispute between United and Mobile, the subject of United's November 10, 1971, amendment to its petition. All legal issues were reserved to be determined at a later date; interveners did not admit the curtailment plan was either authorized or required. They agreed not to seek injunction or damages for curtailments through that period but did not waive the right to seek recovery of capital costs for alternative fuel facilities incurred prior to March 31, 1971. Hearings were recessed on December 22, 1970, and, with agreement of all parties, hearings, did not reconvene until March 31, 1971.

Since that order of December 10, 1970, which set the proceedings for hearing, the 1970–1971 heating season has passed, and United filed, on February 22, 1971, a supplemental petition for declaratory order in Docket No. RP71–29 to provide for curtailments beginning April 1, 1971, for the 7-month summer season. This supplemental petition requested sanction of an extension of United's curtailment program from April 1, 1971, to at least through October 31, 1971, and altered the method of calculating curtailments to meet the system's summer needs. United amended its February 22, 1971, supplemental petition on June 14, 1971, to correct errors in the initially filed summer curtailment program. On March 10, 1971, United filed a Second Revised Sheet No. 72 to become effective June 2, 1971. This sheet was, among other things, intended to clarify the intent of Section 12.1 of United's tariff. Our order of May 18, 1971, suspended these revisions

until June 22, 1971, and consolidated that clarification herein.[4]

United filed proposed tariff revisions in Docket No. RP71–120 to become effective on November 1, 1971, to cover curtailments for the 1971–1972 winter heating season and for an indeterminate period thereafter.[5] This recent filing revises the impairment of deliveries provisions in Section 12 of the General Terms and Conditions portion of United's tariff by adding two new categories of curtailment priorities. It also provides that no payments or credits for substitute fuels will be made or given by United in the event of curtailment, and prohibits resale customers from offsetting the effects of United's curtailments by purchasing valley gas available from another customer of United.

All parties rested on July 27, 1971, after 43 days of hearings; initial briefs were filed August 27, 1971, and reply briefs were submitted September 20, 1971. On August 23, 1971, this Commission granted a motion for omission of the intermediate decision to prevent delay in resolving the important questions raised by United and intervenes in these proceedings. It is important that we now determine, before the next winter heating period commences, the initial and crucial question in this proceeding, whether this Commission has

[4] The addition of a new Section 12.3 to United's General Terms and Conditions to eliminate United's obligation to reduce a buyer's demand charge by virtue of proration was at that time consolidated for hearing in another proceeding, Docket No. RP71–41.

[5] United filed those sheets on May 17, 1971, pursuant to our Order No. 431, in Docket No. R–418. They are designated First Revised Sheet No. 71, Third Revised Sheet No. 72 and a new sheet, Original Sheet No. 72–A. This filing was designated as Docket No. RP71–120 and in part consolidated herein and suspended for one day to November 2, 1971, by a May 28, 1971, order in these proceedings.

the authority to accept and approve tariff filings for curtailment plans affecting both sales for resale and direct sales when that curtailment plan is necessitated by the public interest. We now find and conclude in the affirmative.

Other issues to be determined by these hearings, as set forth in our December 10, 1970, order, such as those relating to the implementation of United's curtailment plan pursuant to Section 12 of United's tariff, and relating to whether the Commission should consider reallocation of United's total gas supply, together with any other unresolved questions raised by United's petitions and the answers thereto, we shall remand to the Presiding Examiner for his recommended decision thereon.

A word is in order about another pending United proceeding in Docket No. CP71-89. There United filed an application on October 1, 1970, requesting a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act to continue operating certain facilities and to continue service heretofore treated as local and intrastate in character. These facilities are known as the New Orleans Division of United's system. A central question in that proceeding is whether those facilities are interstate in character and subject to our jurisdiction. To the extent, if any, they are found to be so, our ruling in this proceeding concerning the Commission's jurisdiction over curtailment programs will apply to volumes transported through those facilities.

JURISDICTION AND CURTAILMENTS

Several parties assert that the Commission has no jurisdiction to allocate gas in curtailment proceedings in a manner inconsistent with existing direct sale contracts. It follows from this argument, that if the

gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers—made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all states served by the jurisdictional pipelines.

We find herein, based upon the Natural Gas Act and the precedents thereunder, that this Commission has the plenary authority to allocate the gas supply of jurisdictional pipelines to all customers, including direct industrial users, regardless of any contracts with individual customers, direct or resale.

A review of the record in these proceedings constrains us to render a declatory order pursuant to United's petition filed October 26, 1970, as amended. Present here are two principal criteria guiding the policy in favor of rendering a declaratory judgment: a judgment will serve a useful purpose in clarifying and settling legal relations and issues and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 944 (CA6, 1949).

At the outset we note that direct industrial sales cannot be made without a certificate from this Commission and that the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of that sale.[6] In addition, the Commission, pursuant to Section 7(b), must determine whether a direct sale—or any sale—should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial

[6] *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471 (CA3, 1956).

sale is made is thus material in both certificate and abandonment proceedings. Short of considering rates as a factor in all certification or abandonment proceedings, the Commission does not assert jurisdiction to determine the rates at which direct sales to industrial customers will be made, but it does not follow that we have no jurisdiction over the transportation and deliveries to direct customers for the following reasons.

Our jurisdiction to oversee the implementation of curtailment plans derives, *inter alia,* from Sections 1(b) and 4 of the Natural Gas Act. Section 1(b) states that "The provisions of this act shall apply to the transportation of natural gas in interstate commerce * * *."[7] Several parties claim that language within Section 1(b) limits our jurisdiction here, "* * * this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale * * * but shall not apply to any other transportation or sale * * *." This is urged as indicating that our jurisdiction does not extend to the sales of gas for direct use and thus, *a fortiori,* does not extend to curtailments of gas sold for direct use. We agree Section 1(b) limits our jurisdiction over the rate at which direct sales are made, *F.P.C.* v. *East Ohio Gas Co.,* 338 U.S. 464 (1950); *City of Hastings, Nebraska* v. *F.P.C.,* 221 F.2d 31, 39 (CADC, 1954), *cert. denied,* 349 U.S. 920 (1955), but in exercising our certificate jurisdiction or jurisdiction over the abandonment of direct sales, we must and do consider the rates at which direct sales are made. However, Section 1(b) also provides us with jurisdiction over the transportation of gas in interstate commerce, and there lies our power and duty to act at this time of curtailments. Any transportation by a jurisdictional pipeline is in interstate

[7] 52 Stat. 821 (1938), 15 U.S.C. Sec. 717(b).

commerce, including the transportation and sale of gas to a direct industrial user. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507, 516–517 (1947), is cited by some parties for the proposition that Congress did not intend this Commission to regulate direct sales for consumptive use. But the case in no uncertain terms stands for the opposite conclusion. There Panhandle challenged the Public Service Commission's authority to require the filing of information to regulate direct sales. To support its position, it argued that state regulation of direct sales would result in a conflict among states on the issue of curtailments during periods of gas shortage. The United States Supreme Court affirmed a ruling upholding the Indiana Commission's authority to regulate certain aspects of direct sale; but in affirming, the Supreme Court recognized its holding was not the broad stroke delimiting all forms of Federal regulations concerning direct sales that those opposing our exercise of jurisdiction now argue. There the court merely found, "* * * the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation * * *." (332 U.S. at 523–4). In so finding it did not find conversely that this Commission is powerless in the area.[8] The Court specifically recognized this Commission's authority to act on a national level in instances relating to direct sale curtailments (332 U.S. 523):

> Appellant also envisages conflicting regulations by the commissions of the various states * * * particularly in relation to *curtailment of service* * * * if such conflicts should

[8] *Cf. F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 473–4 (1950).

> develop, the matter of interrupting service is one largely related, as appellees say, to *transportation* and thus within the jurisdiction of the Federal Power Commission to control in accommodation of any conflicting interests among various states. [Footnote omitted; emphasis supplied.]

Curtailments thus do not relate to rates, they relate to transportation wherein our jurisdiction here lies. "And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation." *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464, 468 (1950).[9] In *South Georgia Natural Gas Co.*, 23 FPC 795 (1960), we said, "Section 1(b) of the Act * * * states that the Commission shall have jurisdiction over the 'transportation' of gas for direct sales, but not over the direct 'sales' themselves." 23 FPC at 796. Thus, while we generally do not assert jurisdiction to determine the *rates* at which direct sales are made (except in certificate or abandonment proceedings), we possess authority to regulate the *volumes* of gas transported for direct sale.[10]

It is argued that lack of rate jurisdiction over direct sales precludes our exercising jurisdiction over tariff provisions affecting direct sales. Among the cases cited for this argument is *Colorado Interstate Gas Co. v. F.P.C.*, 185 F.2d 357 (CA3, 1950). Unlike the situation in *Colorado*, the curtailment plans, as set out in this order, do not directly apply to rates and charges. Moreover, the court in *Colorado* relied upon *Panhandle Pipe Line Co. v. Public Service*

[9] For further cases on this point see *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 359 F.2d 675, 682–3 (CA8, 1966).

[10] See *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947); *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 232 F.2d 467, 471–2 (CA3, 1956, *cert. denied*, 352 U.S. 891 (1956).

Commission of Indiana, supra, for its holding but, as noted above, the Supreme Court in *Panhandle* specifically said that the exceptional situation created by curtailments would vest authority in this Commission to act. Also on this point, the holding in *Granite City Steel Co.* v. *F.P.C.*, 320 F.2d 711 (CADC, 1963) is not relevant and material to the question of our *jurisdiction* to approve and authorize curtailment plans because it concerned, instead, only the question of reallocating volumes to provide gas for new customers pursuant to Section 7(a) of the Act.

This jurisdiction over the transportation of gas in interstate commerce is and must be of a continuing nature, otherwise our jurisdiction over the direct connection in the first instance would be insignificant, *South Georgia Natural Gas Co.*, 23 FPC at 796. Nor does this continuing jurisdiction apply only to Section 7 issues alone, for it is axiomatic that whenever our jurisdiction applies in the first instance pursuant to Section 1(b) of the Act, each of the Act's other provisions may be utilized to carry out the regulatory purposes of Congress for which jurisdiction was to initially attach; except, and only except, to the extent limited by Section 1(b) of the Act. The general object and purposes for which the Act was passed includes the desire to eliminate and prevent unfair, unreasonable or discriminatory service to the gas consuming public. This cannot be accomplished without full authority to rule upon a curtailment plan; a matter toward which our authority over the transportation of gas for resale or direct sale must be aimed. Our transportation jurisdiction does not relate solely to arrangements whereby gas is transported for another pursuant to a transportation agreement but it relates also to the transportation of gas for direct

sale by the pipeline, *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471–2 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Curtailment situations are not new. Shortly after World War II, gas was not available in quantities equal to the demands of firm customers. Questions concerning supply allocation arose between Panhandle Eastern Pipe Line Company and its customers. This Commission took an active part in assuring fair application of gas allocations. We required Panhandle to file "proposed rules and regulations to govern curtailment and interruption of gas service." Following hearings on the proposals filed, and voluntary agreement, emergency rules for curtailment became embodied in Panhandle's rate schedules. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946). These rules affected direct customers of Panhandle as well as wholesale customers.[11]

The outcome of the litigated cases that followed Panhandle's curtailment left no doubt that our authority extends to allocating or approving the allocation of volumes of gas during gas shortage situations. We ruled on precisely this issue with respect to contracts filed pursuant to Section 4 of the Act in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 203–4 (1947). In *Michigan Consolidated Gas Co.* v. *F.P.C.*, 203 F.2d 895, 900 (CA3, 1953) the court said, "The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence." In another case, *Michigan Con-*

[11] The following year voluntary agreements could not be reached but similar rules for curtailments were again issued. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

solidated Gas Co. v. *Panhandle Eastern Pipe Line Co.* 226 F. 2d 60 (CA6, 1955), *cert. denied* 350 U.S. 987 (1956), the court affirming a lower court's refusal to assume jurisdiction of a claim for damages under a gas contract breached, of necessity, due to a gas shortage, said (226 F. 2d at 70):

> * * * The problems * * * involved * * * "intricate problems of service as between different users and different geographical sections" and required for their decision the technical understanding and expert knowledge of the Commission. The transactions * * * relevant involve eight states and great metropolitan areas. The problems of changing industrial conditions and growing needs for natural gas both territorially and otherwise are so extensive they do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission.

Similarly, in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (CA6, 1949) the court said, "* * * the operation of existing facilities in such manner as is sought may * * * result in changes of service to other customers without undue preference or undue discrimination within the power of the Commission to control * * *."

This latter language pinpoints the need for our authority to act here. A system-wide gas shortage reduces volumes transported and necessarily causes a change in the operation of existing facilities that serve customers in several states in several regions; each with unique climatic, geographic and economic characteristics, and can affect service to homes, schools, hospitals, and other institutions. Without our exercising plenary jurisdiction over all phases of curtailment, any of the pipeline customers might be the object of undue discrimination stemming from

some customers taking deliveries of gas for direct industrial consumption in one state in such quantities as to impair deliveries to cities and towns in the same or other states, with uncontrolled disruption resulting therefrom.

Our continuing control over the transportation of all gas transported or sold, whether for resale or direct sale for consumption, to carry out the basic intent of the Act, insofar as we are not specifically precluded by Section 1(b), runs in part to preventing the type of discriminatory practices set forth in Sections 4(b) and 5(a) of the Natural Gas Act.[12]

Those sections of the Act cover a broader range than simply the regulation of rates or charges. While that portion of section 4(b) of the Act prohibiting "undue preference or advantage * * * or * * * undue prejudice or disadvantage" or that portion which does not permit any pipeline to "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect * * *", may be applied to prevent the evasion of "just and reasonable rates," they may be applied equally to prevent discrimination in "service," which in curtailment cases, as here, may not be quantifiable into rates. In such instances, our regulatory power granted in Sections 4(b) and 5(a) of the Act would be unduly restricted were we unable to oversee all curtailments affecting service. The Supreme Court has specifically pointed to that language within Section 5(a) of the Act relating to the Commission's authority to correct "unjust, unreasonable, unduly discriminatory, or preferential" activities or contracts and said, "It is clear that contracts covering direct industrial sales come within that * * * clause of Section 5(a)." *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 647 (1945).

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[12] 52 Stat. 822, 823, (1938), 15 U.S.C. Secs. 717c, 717.

Thus, it is our duty to determine whether the practices forbidden in Section 4(b) or 5(a) of the Natural Gas Act in fact have occurred and to prevent any such practices from occurring or continuing to occur pursuant to United's filed tariff.

To carry out this mandate, a uniformly applied curtailment plan is required; one that necessarily involves several states would be virtually uncontrollable at the state regulatory level. Operating factors such as pressures at various system points, demands, and supplies are all relevant to a curtailment plan's operations, and jurisdiction to oversee all these factors is required—the states are powerless to control sufficiently and individually all these factors to provide fair service to consumers in each of their states and in other states. We must act, and our action must include direct sales, or else no effective control over curtailments will be possible.

In the past, when the extent of our jurisdiction to act has come into issue, the answer has required a return to the basic purposes of the Act. Many times stated, it is in the intent to give full protective coverage to the consumer. *Atlantic Refining Co.* v. *P.S.C. of New York,* 360 U.S. 378 (1959). Courts have often found it necessary in protecting the public interest that we rule in ways affecting direct sales. See *Panhandle Eastern Pipe Line Co.* v. *F.P.C.,* 359 F. 2d 675, 682–3 (CA8, 1966). Full protection is obviously lost unless we oversee these curtailment plans in their entirety. If we refuse jurisdiction here on the grounds that all regulation affecting direct sales in any manner is forbidden by Section 1(b) of the Act as a matter of local concern, comprehensive regulation of United's operations during curtailments would be impossible, since a uniformly fair plan coordinated by the State commissions could not reasonably be expected to be

overseen by them. This is precisely the type of problem which the Natural Gas Act was intended to alleviate. Thus, our action here does not usurp state regulatory functions; it undertakes to do that which the states acting individually cannot effectively do and thus complements state regulation.

It is argued that even assuming the Commission has full jurisdiction over curtailment plans, the curtailment program must still be consistent with contractual obligations. We do not agree. Our determination concerning the curtailment plan must be undertaken without regard to the many and various contractual obligations of United. In considering the curtailment plan presented by United, we must appraise it to determine whether it is a proper and equitable approach in view of the anticipated extent of the curtailment, the relative interests and positions of the customers and others affected, and the overall gas supply situation. It is well settled that pipelines and other parties cannot by contract avoid their public interest obligations once our jurisdiction attaches. *California v. Lo Vaca Gathering Co.*, 379 U.S. 366 (1965); *Sundry Mid-Continent Oil Co. v. F.P.C.*, 364 U.S. 137 (1960).

The best example of why we cannot provide that curtailment programs meet all contractual obligations is the case before us. United's contracts provide generally that gas for domestic consumers has the highest priority and that remaining gas shall be prorated by United among its other customers. No provision is made in these contracts for priorities based upon other superior needs or purposes that may be valid and required by the public interest. For example, United's own proposed priority categories for industrial users, or for users of gas as a raw material, might be required by the public interest. Other priority categories might also be valid, such as gas used for national de-

fense purposes. Thus, merely because United's direct sale contracts fail to provide adequately for all situations related to service in the public interest—which we are bound to protect—should not and must not limit our authority here. Nor can it be supposed that the parties or the Commission should foresee at the time of certificate approval all possible public interest priorities that might supersede the contractual obligations to deliver gas.

There is no doubt that the present gas shortage has created new circumstances giving rise to the need to consider more carefully whether the sales of a pipeline are fully compensatory so as to enable the continued efficient and economic operation of pipelines in all areas, financial as well as operative, and to better enable the acquisition of gas supplies so desperately needed. Given these new circumstances, we must be free to act on a broad geographic front across state lines to mitigate the interstate effect of gas shortages consistent with Congress' intention "* * * to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *" *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507, 520 (1947).

Some parties have argued that we may consider curtailment programs only under Section 7(b) of the Act as proposals to abandon service. We do not find that when curtailments are required due to a gas shortage that it is necessary to file a request for abandonment of service pursuant to Section 7(b) where, as here, the service reduction or stoppage foreseen is one of a temporary nature and where there is expectation that prior service levels will be resumed when gas supplies are available. We agree with our previous holdings in *City of Detroit* v. *Panhandle*

Eastern Pipe Line Co., 6 FPC 196, 203 (1947), that that we have jurisdiction and authority under Sections 4 and 5 of the Act to consider, approve, or establish curtailment programs as the circumstances may require in assuring reliability of service to the public served by interstate pipeline companies.

We could, if we so chose, amend, pursuant to Section 16 of the Act, our previous certificate orders relating to the transportation of gas by United for the sale to both resale and direct sale customers in order to provide for this emergency curtailment situation not foreseen at the time the orders were issued initially. We could prescribe service criteria for each individual direct customer under our continuing certificate authority that might not afford each direct customer precisely the same treatment as all others as a result of varying circumstances and public interest considerations. Instead, we have chosen, as the means of administering curtailment plans, to require, pursuant to Section 4 of the Act, the filing of tariff sheets prescribing those plans and affording all interested parties an opportunity to be heard. Of course, this approach does not hinder our authority to grant emergency relief where special circumstances require it in the public interest.[13] These filings receive RP docket numbers because they relate to tariff changes, not necessarily to rate changes. Our Statement of General Policy in Docket No. R–418; Order No. 431, made clear our intent to approach curtailments in this manner. In our view, the filing of tariff provi-

[13] See two orders issued July 2, 1971, in these dockets titled: Order Deferring Final Ruling On Motion For Interlocutory Order And Providing For Evidentiary Hearing, and Order Authorizing And Directing Interim Enforcement Of Curtailment Program Pending Final Determination Of Issues. See also our order herein issued July 28, 1971, titled Order Denying Motion For Reconsideration.

sions and providing hearings thereon will actually serve to reduce the opportunity for inequities between various individuals receiving gas from United.

On the other hand, it may be necessary to approve and order abandonment of service to various of United's direct or resale customers, should United's supply of natural gas be so depleted that the continuance of that service is unwarranted, or if the service or sale is no longer permitted by the public convenience or necessity. At a period when gas supplies are low, justification for the continuance of service may depend in part on whether such service makes a compensatory contribution to the pipeline so as to enable continued unimpaired operations. *Cf. South Georgia Natural Gas Co.*, 23 FPC 795; 797 (1960).

CATEGORY V

We now turn to United's tariff changes filed May 17, 1971, in Docket No. RP71–120, proposed to become effective for the 1971–1972 heating season. United submitted three proposed tariff sheets pursuant to our Order No. 431 that are to become part of its First Revised Volume No. 1, consisting of First Revised Sheet No. 71, superseding Original Sheet No. 71; Third Revised Sheet No. 72, superseding Second Revised Sheet No. 72; and Original Sheet No. 72–A.

These sheets would revise the existing Impairment of Deliveries provision contained in Section 12 of the General Terms and Conditions of United's tariff. They provide in Section 12.1 for a proration of impaired deliveries by setting out two new categories of service priority: Category II involving "process" gas and a new "lowest priority" Category V for power plant and industrial customers, whether served directly or indirectly by United, and paying a rate

less than the applicable city gate jurisdictional rate at a 100 percent load factor in the same rate zone. The revised sheets also would prohibit curtailed customers from offsetting curtailments by obtaining gas from another supplier who obtains gas either directly or indirectly from United, and prohibit any customer of United from selling gas to anyone to offset gas curtailed. In addition, they would add to Section 12.3 a statement that no payments or credits for substitute fuels will be made or given in the event of curtailment.[14] United's filing in this docket did not request a declaratory order but was filed pursuant to our Order No. 431.

Most of the twenty-nine initial briefs that were filed in this proceeding have objected to portions of these new tariff sheets filed by United, particulary that portion respecting the establishment of the low priority Category V. Besides the initial question of whether the Commission may exercise plenary jurisdiction over curtailment plans (resolved above), United's filing of May 17, 1971, raises, among others, the question of whether the Commission should approve curtailment plans that essentially define a class of customers for curtailment purposes as those who pay noncompensatory rates.

We find that the tariff language proposing Category V should be rejected for the reasons herein stated. United must file by November 2, 1971, new tariff sheets eliminating that language concerning Category V and realigning all customers into the four remaining categories for the Examiner's and our consideration on the merits. United attempts to justify its Category V upon a need to obtain reve-

[14] Section 12.3, entitled Demand Charge Adjustment and Substitute Fuel Payment Obligations, was first proposed on March 10, 1971, on Second Revised Sheet No. 72.

nues from its sales which are compensatory. This, it says, would help remedy the shortage by affording it an opportunity to spend more money to enable it to obtain new reserves. We find that there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available. If United believes certain sales are adversely affecting its ability to serve its customers and its ability to serve the public interest, it should instead request authority to abandon those sales pursuant to Section 7(b), regardless of any contracts affected.

SUBSTITUTE FUEL CLAUSE ADJUSTMENTS

We should now also consider questions before us regarding the substitute fuel clauses proposed in Section 12.3 of United's tariff. These questions first came before us when United filed, on March 31, 1971, in Docket No. RP71-99, a petition for a declaratory order requesting we issue an order determining and limiting United's obligations under substitute fuel clauses in five of its contracts with three customers purchasing gas under those contracts from United.[15] That docket was consolidated with the other dockets in this proceeding by order of September 15, 1971. We said the issues raised therein are questions of law not requiring an evidentiary hearing and are similar to the other issues in this proceeding.

Similar questions arise in Docket No. RP71-120 as a result of United's filing Original Sheet No. 72-A which, in part, added to Section 12.3 of the General Terms and Conditions of its tariff the language, "* * *

[15] Answers were filed by the three parties to the contracts: International Paper Company, Mississippi Power Company, and Mississippi Power & Light Company.

nor shall Seller be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption."

We decline to render a declaratory order in Docket No. RP71-99, and so dismiss United's petition, because it requests an interpretation of contract terms unnecessary in light of our action herein exercising jurisdiction over curtailment plans.

Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the courts. No additional tariff language like that proposed in Section 12.3 on Original Sheet No. 72-A is necessary to limit liability under contracts when agencies' orders, rules, or regulations authorize actions contrary to those contracts. In *Michigan Consoliated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (CA6, 1949), the court refused to grant relief to Michigan Consolidated despite the existence of a contract between that company and Panhandle. The court said (173 F.2d at 789):

> The collateral relief prayed by Consolidated is also, in our judgment, beyond the jurisdiction of the court to order without interfering with the regulatory powers of the Commission. * * * We do hold that adequacy and impartiality of service, in the light of existing circumstances, is within Commission control. This must be so if control over rates means anything, since adequate service is a necessary concomitant in the fixing of reasonable rates. * * * If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can

> attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service.

In a similar case, *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942 (CA6, 1949) the court found invalid a lower court's temporary injunction granted to prevent curtailment of gas delivery from Panhandle to its distributor Michigan Consolidated. In so ruling the court said (177 F.2d at 944–45):

> In the Detroit case we were of the view that the Commission had power to prescribe emergency service rules and regulations with respect to deliveries of gas by a pipe line company to a distributor without regard to contract requirements * * *.
>
> * * * * *
>
> * * * As we have already seen, it is within the Commission's power to regulate service by emergency orders without respect to contract obligations.

The Supreme Court recognized this principle in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968), saying, "* * * the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." See also *L.N. Jackson & Company v. Royal Norwegian Government*, 177 F.2d 694, 697 (CA2, 1949), stating, "For it is well settled that a contractual duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited

by an administrative order made with due authority by an officer of the United States. Restatement, Contracts § 458(b), 1932; Williston on Contracts, §§ 1938, 1939, Rev. Ed. 1938."

Therefore, the language in United's tariff precluding the operation of substitute fuel clauses when curtailments are properly implemented is unnecessary.

GAS CURTAILMENT OFFSET

United has proposed tariff language in Docket No. RP71–120 that would prohibit the purchase or sale of gas between a customer of United and another customer of United to offset gas curtailed by United. That language is:

> Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith.[16]

We reject this proposed language as beyond our jurisdiction to approve. Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. We will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocation among United's customers, we leave for the states or other local bodies the job to oversee the distribution of

[16] See United's Third Revised Sheet No. 72 and Original Sheet No. 72–A of its FPC Gas Tariff, First Revised Volume No. 1.

that gas by the customers at the local level. This proposed language is not an integral part of United's curtailment plan: the later disposition by one of United's customers of volumes sold by United, or the purchase by United's customers of gas originating from United, does not affect United's ability to limit the total volume of gas delivered by it. There is no showing that this proposed tariff language would have the slightest beneficial effect on the gas supply of a single customer of United.

PENDING MOTIONS

Also before us are four motions. One was filed on August 12, 1971, by Marquette Cement Manufacturing Company and Container Corporation of America (Marquette and Container Corp.) to sever for immediate consideration an issue regarding the validity of United's establishment of a new low priority Category V in its priority list for curtailments.[17] In the alternative, Marquette and Container Corp. ask that, if the Commission permits Category V to become effective, that it do so conditionally upon an express agreement by United to refund, if the Commission ultimately disapproves this category, the differences between the rates now paid under contract and the higher contract rates paid by any customer pursuant to a contract entered into as a result of this priority system. Four answers representing eight direct customers of United were filed in support of the motion. United opposes the motion.

In light of our disposition regarding Category V above, the motion of Marquette and Container Corp. is now moot and should be dismissed.

[17] This Category consists of those customers, other than domestic, purchasing gas at the city gate 100% load factor zone rate.

Two motions were also filed requesting enlargement of the suspension period of United's proposed tariff sheets which were filed May 17, 1971, in Docket No. RP71-120; one by Gulf States Utilities Co. on September 9, 1971, and one by New Orleans Public Service Inc. on September 13, 1971.[18] Gulf States also requests that we defer the effective date of United's tariff until 30 days after the Commission passes upon the issues. Mississippi Power & Light answered in support of these motions on September 15, 1971. Our disposition above regarding the propriety of Category V removes the most significant basis and reason for these two motions. In addition, we have previously stated in our Order of July 2, 1971, in these proceedings, which directed interim enforcement of the curtailment program, United should be required to carry out its filed curtailment plan pending a decision on the issues. We do not defer from that principle, and the motions must be denied.

A fourth motion, filed on August 13, 1971, by International Paper Company and Scott Paper Company seeks enlargement of the extension period of that portion of United's proposed tariff that would prohibit a customer from reselling gas to other United customers to offset gas curtailed by United.[19] This provision was filed by United in Docket No. RP71-120. Again, our action above moots this request and the motion should be dismissed.

The Commission further finds:

(1) United Gas Pipe Line Company is engaged in the transportation and sale for resale in inter-

[18] Gulf States filed a follow-up motion for expeditious consideration on September 15, 1971.

[19] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

state commerce of natural gas and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of November 10, 1942, in Docket No. G–232, 3 FPC 863.

(2) Plenary jurisdiction resides within this Commission to accept, modify, and/or approve the curtailment plans proposed by United Gas Pipe Line Company or any other jurisidictional pipeline company relating to gas transported both to resale and direct sale customers.

(3) The curtailment priority Category V set forth on the proposed Third Revised Sheet No. 72 should be rejected as being an improper provision in a curtailment plan.

(4) The proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72–A stating, "Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith" should be rejected as implying an extension of Commission jurisdiction over the local distribution of gas.

(5) The petition for a declaratory order in Docket No. RP71–99 should be dismissed.

(6) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of Marquette Cement Manufacturing Company and Container Corporation of America, filed August 12, 1971, to sever and decide whether United's proposed curtailment priority classification, Category V, is proper, be dismissed.

(7) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motions of Gulf States Utilities Company, filed September 9,

1971, and of New Orleans Public Service, Inc., filed September 13, 1971, to enlarge the suspension period for the effective date of United's proposed tariff sheets, First Revised Sheet No. 71, Third Revised Sheet No. 72, and Original Sheet No. 72–A, be denied.

(8) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of International Paper Company and Scott Paper Company filed August 13, 1971, for enlargement of the suspension period of a portion of United's proposed tariff, be dismissed.

(9) The motion for oral argument filed September 22, 1971, by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, should be denied.

The Commission orders:

(A) Issues in these consolidated proceedings not here decided are remanded to the Presiding Examiner for his initial decision regarding the proper interpetation and implementation of United's proposed curtailment plans, and the reasonableness thereof as set forth in both its petition for declaratory order, as amended and supplemented, in Docket No. RP71–29, and its filing, as amended and supplemented, pursuant to our Order No. 431, in Docket No. RP71–120. Such initial decision should also include findings concerning the environmental impact of United's curtailments.

(B) The proposed language on Third Revised Sheet No. 72 relating to Category V, and the proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72–A relating to the offsetting of curtailed gas, as quoted herein, are rejected. United Gas Pipe Line Company shall file new proposed sheets by November 2, 1971, deleting that language from its tariff.

(C) The petition for a declaratory order filed by United Gas Pipe Line Company in Docket No. RP 71–99 is dismissed.

(D) The motion of Marquette Cement Manufacturing Company and Container Corporation of America is dismissed.

(E) The motions of Gulf States Utilities Company and New Orleans Public Service Inc. are denied.

(F) The motion of International Paper Company and Scott Paper Company is dismissed.

(G) The motion for oral argument by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, is denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

APPENDIX F

UNITED STATES OF AMERICA FEDERAL POWER COMMSSION

CERTIFICATES—DIRECT SALE CONTRACTS—GAS SUPPLY—JURISDICTION—PUBLIC INTEREST—SERVICE—TARIFFS—TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

UNITED GAS PIPE LINE COMPANY
(Docket Nos. RP71-29, RP71-120, RP71-99)

(Opinion No. 606-A)

OPINION AND ORDER DENYING REHEARING AND DENYING MOTIONS TO REOPEN RECORD

(Issued December 3, 1971)

Nine applications and petitions for rehearing and clarification of the Commission's Opinion No. 606 and Order issued October 5, 1971, have been filed by twelve

intervenors in this proceeding.[1] In addition, the State of Louisiana, *et al.*, has petitioned for a reopening of the record.

REQUESTS FOR REHEARING AND MODIFICATION

The petitions requesting rehearing and modification do not convince us that rehearing should be granted or that our Opinion No. 606 should be modified. Thus we view our orders in Opinion No. 606 and on rehearing here to be final and fully reviewable upon the matters decided therein.

Several petitioners contend the Commission erred in finding it has plenary jurisdiction over curtailment plans of jurisdictional pipelines.[2] No arguments not previously considered concerning our authority under the Natural Gas Act were raised by the petitions except that the State of Louisiana claims that there is no express grant of authority in the Natural Gas Act permitting the Commission to allocate a jurisdictional pipeline's scarce gas supplies to even resale customers and says Commission action is "without the benefit of any undisputed authority or congressional standards."[3] That contention was settled adversely to Louisiana's position in *Panhandle Eastern Pipe Line*

[1] In alphabetical order they are: Gulf States Utilities Company; International Paper Company; Louisiana Power & Light Company; Mississippi Power & Light Company; Mississippi Power Company; Mobile Gas Service Corporation, jointly with Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; New Orleans Public Service Inc.; Olinkraft, Inc.; and State of Louisiana, jointly with Louisiana Municipal Association, and Parish of Cameron, Louisiana.

[2] Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power and Light Company, Mississippi Power Company, Mobile Gas Service Corp., *et al.*, New Orleans Public Service Inc., and State of Louisiana.

[3] Mobile Gas Service Corp., *et al.*, also discuss this in their petition for rehearing.

Co. v. *F. P. C.*, 232 F.2d 467 (3rd Cir. 1956), *cert. den.*, 352 U.S. 891 (1956). In that case the Commission refused to allow Panhandle to use its interruptible gas to make direct industrial sales instead of selling such gas to its resale customers. The court affirmed the Commission's order, holding that the Commission has the power under the Act to control all deliveries of gas so as to prevent Panhandle from discriminating against its existing customers. The court pointed out that although the States may fix the rates at which gas is sold to direct-sale customers, the State "* * * tribunals in turn have no warrant to interfere in the Commission's allocations" (232 F.2d at 473).

Our Opinion No. 606 made clear that the basis of our jurisdiction to act over curtailments, respecting not only resales but direct-sale customers as well, derives from Sections 1(b), 4, 5, 7, and 16 of the Natural Gas Act. Decisions in proceedings before the Supreme Court and other appellate courts, the history of natural-gas regulation during a previous period of curtailments, and the basic purposes and policies of the Natural Gas Act confirm this authority, as detailed in Opinion No. 606.

Mississippi Power Company argues that if curtailment plans do not directly apply to rates and charges they should not be a part of United's tariff. Our Regulations require the filing of additional information regarding the classifications and practices of a pipeline company affecting services as well as those affecting rates and charges,[4] and the Commission has authority to prevent undue discrimination. See *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945). The form of filing is not the controlling consideration.

[4] Sections 154.1 and 155.1 of the Commission's Regulations.

Several petitioners [5] request a hearing or clarification of our ruling and rationale finding as unnecessary, but permissible, United's proposed language regarding substitute fuel clause adjustments. All concur in our rejection of that language and in our dismissal of United's petition in Docket No. RP71–99, but object to our bases for doing so. In clarification, this Commission has the responsibility and the authority to protect all consumers from efforts by pipelines to grant preferences in service to particular customers or classes of customers in times when gas shortage precludes fulfillment of all contracts for delivery of gas. A claim of preference in service directly or, in the case of substitute fuel clauses, indirectly, cannot operate to deprive this Commission of authority to assure fair and equitable curtailment plans. The pipeline companies cannot be faced with the dilemma of providing nondiscriminatory service as ordered by the Commission and at the same time insure liability for breach of contracts which grant discriminatory preferences, directly or indirectly. Thus, the Commission's authority to preclude undue preferences and discriminations in service operates to preempt any contract provisions inconsistent with the exercise of that authority as not being in the public interest.

International Paper argues that no question is involved of specific relief under the substitute fuel adjustment clauses in United's contracts and that therefore the cases relied upon by the Commission

[5] Gulf States, International Paper, Mississippi Power & Light Company, Mississippi Power Company, Olinkraft, Inc., and State of Louisiana.

are inapposite.[6] International Paper miscontrues our purpose for the citations. They serve to point out that this Commission has the authority to issue orders (such as orders approving a curtailment plan) to carry out the purposes of the Natural Gas Act regardless of existing contractual commitments (such as direct sales commitments) of the natural-gas companies subject to our jurisdiction. While those cases are related to contracts involving sales for resale, we believe, as Opinion No. 606 made clear, that the principle they stand for is equally applicable to direct sales. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945).

CONSIDERATION OF OTHER ISSUES

Louisiana asks that the proceedings be reopened for receipt of further evidence to determine whether United either deliberately or negligently brought its systemwide gas shortage upon itself. This question was already briefed by the parties and the question was remanded with other issues to the Examiner for his decision.

Louisiana also asks us to specify that the remand to the Examiner be broadened to include issues raised in Louisiana's reply brief concerning whether United's curtailment classifications should also distinguish between full and partial requirements customers and whether they should distinguish between localities within Louisiana and localities elsewhere. These issues are questions relating to the propriety and implementation of United's curtailment plan—questions which were specifically remanded to the Examiner

[6] *Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 748 (1968).

for his decision.[7] The arguments of Louisiana are thus available to the Examiner for his consideration.

Louisiana further requests that the remand be broadened to consider whether this Commission has abused its discretion in approaching the national gas shortage on a pipeline-to-pipeline basis rather than upon a nationwide basis which would permit consideration of equities between gas-producing States and gas-consuming States, and whether the failure to conduct a nationwide allocation study to allocate gas between States is prejudicial to Louisiana localities. Without reaching the question of the extent of our jurisdiction to allocate the gas supply on a nationwide basis or after a nationwide allocation study, we have determined that the proper scope of this proceeding is that set forth in Opinion No. 606.

Louisiana additionally asks that the record be reopened pursuant to our direction to the Examiner in Opinion No. 606 to make findings concerning the environmental impact upon the health of Louisiana residents of United's curtailments. Louisiana avers that presently the record evidence is limited to the economic impact of curtailments. Louisiana's request is more properly directed to the Examiner who now has the proceedings before him as a result of our remand in Opinion No. 606 of the issues not there decided.

Olinkraft, Inc., notes that our Opinion No. 606 did not correctly state its position regarding the interim settlement approved on December 29, 1971. To the extent that the transcript references cited by Olin-

[7] Louisiana requests that official notice be taken of its appendices to its reply brief. Because we leave for the Examiner to consider the relevance of Louisiana's contentions, we believe he should rule upon that request since he will be better able, at this time, to assess their materiality and revelance to these proceedings.

kraft indicate a contrary position, we so recognize that as Olinkraft's position at that time.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the applications filed by the above-named petitioners present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 606 and accompanying order of October 5, 1971, except as that Opinion has been clarified above.

The Commission orders:

The applications for rehearing of Opinion No. 606 filed by the above-named petitioners are denied.

By the Commission. (Commissioner Carver dissenting filed a separate statement appended hereto.)

(SEAL) KENNETH F. PLUMB,
Secretary.

UNITED GAS PIPE LINE COMPANY

(Docket Nos. RP71-29, RP71-120, RP71-99)

(Issued December 3, 1971)

CARVER, *Commissioner,* dissenting:

By reason of absence, I did not participate in Opinion 606. I dissent to the order denying rehearing principally because the Commission has passed up an opportunity to correct some of the extravagances of jurisdictional assertions therein, a deficiency not cured by the circular statement that ". . . we have determined that the proper scope of this proceeding is that set forth in Opinion 606."

I continue in the conviction, expressed principally in dissenting statements over the past years, that the Natural Gas Act and the Federal Power Act delimit this Commission's jurisdiction according to a fair reading of their terms. See *Florida Power & Light*

Company, Docket No. E-7210, 37 FPC 544, March 20, 1967, at p. 556; *Algonquin Gas Transmission Company, et al.,* 37 FPC 1128, June 27, 1967, at p. 1146; *Ohio Power Company, et al.,* 38 FPC 881, November 3, 1967, at p. 890; *Alabama-Tennessee Natural Gas Company, et al.,* 38 FPC 1069, November 30, 1967, at p. 1082; *Hugoton Production Company,* 41 FPC 490, April 17, 1969, at p. 504; *William Harvey Denman, Trustee, et al* v. *J. M. Huber Corporation,* 42 FPC 164, July 23, 1969, at p. 175; Reliability of Electric and Gas Service, Docket No. R-405, Policy Statement, Notice of Investigation and Proposed Rulemaking with Respect to Developing Emergency Plans, 44 FPC ——, November 4, 1970; *Arkansas Louisiana Gas Company,* Docket No. RP71-122, Order Granting Emergency Modification of Curtailment Plan Pending Final Commission Decision, issued November 30, 1971.

On a separate but related point, I also would grant the relief now requested by International Paper and Mississippi Power and Light, asking moderation of the declaration that the Commission's order "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief." This is a self-serving dictum not binding on anyone, least of all the courts who must ultimately rule upon the effect of our orders. I very much doubt that the judicial branch can be foreclosed from awarding damages for breach of a substitute fuel clause in a contract which neither required nor received the approval of this Commission, to take the one example cited by International Paper. A proper sense of comity in judicial-administrative relations calls for an abandonment of this fruitless attempt to delimit judicial remedy.

JOHN A. CARVER, JR.,
Commissioner.

APPENDIX G

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

Section 1:

(a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received

is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisidiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep

open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its rea-

sons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect;[1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that

any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or

municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was

bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

Section 16:

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or

forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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